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THE DEVELOPMENT OF ITS LAWS AND CONSTITUTIONS

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THE REPUBLIC OF INDIA

The Development of its Laws and Constitution

SECOND EDITION

BY

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PREFACE TO THE FIRST EDITION

THIS book is an attempt to explain, for the benefit of the general reader, the new Constitution of the Republic of India, and the body of law in force in that country. Dealing with this subject in a book of this size has naturally involved a great deal of compression, and the omission of many matters of interest. I hope that my selection of material will give a fair outline of the general picture.

I wish to express my gratitude to Professor S. G. Vesey-FitzGerald, Dean of the Faculty of Laws in the University of London; to Mr. J. B. Harrison, Lecturer in Modern Indian History at the School of Oriental Studies; to Mr. G. R. Rajagopaul, of the Indian Ministry of Laws; and to Mr. G. E. Harvey, I.C.S. (Retd.), for their advice and assistance.

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August 1950.

PREFACE TO THE SECOND EDITION

As the greater part of the first edition was written before the inauguration of the Indian Republic and so much has happened in the last fourteen years, it is now out of date. The Constitution has been considerably amended and there is a large and important body of case law. While this edition was in the press, the death was announced of Mr. J. H. Nehru, to whose public spirit and relentless industry more than anything else, the Constitution, as outlined in these pages, must be attributed.

The second part of the first edition no longer gives a fair account of the Indian Statute Book, for the Indian legislatures have maintained their reputation for industry, Parliament having passed over five hundred Acts between 1950 and 1956. It is hoped that the trends of the new legislation have been adequately indicated.

I wish to express my thanks to Dr. A. S. Anand for reading my manuscript and proofs and making invaluable suggestions.

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THE DEVELOPMENT OF THE CONSTITUTION AND LEGAL SYSTEM OF INDIA

CHAPTER 1

INTRODUCTORY

Geographical and demographic factors

The sub-continent, which, before 1947, was known as India, bounded on the north by high mountain ranges, and the east and west by the sea, is a geographical unit. Despite differences in race, religion, economic activity and development, and in climate, there are now no obvious interior frontiers, and such internal divisions as it has seen have been mainly due to political reasons. A rising political power has, therefore, always aspired to achieve hegemony, an ambition attained by the Maurya dynasty in the third century B.C., by the Guptas in the fourth century A.D., by the Mughuls in the sixteenth century, and by the British in the nineteenth century.

The establishment of a strong central government has coincided with periods of comparative prosperity for India. There would, therefore, be a natural tendency for the constitution-maker to favour concentrating political power at the seat of the Central Government. As the majority of the population are Hindus, with historical memories of the glories of the Gupta era, we may expect to find a centripetal tendency in the form of government, and in the way it works.

The country and the population [1] are, however, large for a unitary state. A *majority of the population are poor, uneducated peasants*, who cannot reasonably be expected to look upon many political problems from the All-India standpoint. Economic and cultural differences often demand separate treatment of the same problems in different parts of India. Either devolution or federalism is essential, so *we must expect a centrifugal tendency counteracting the* centralising tendency already noticed. Unhappily, the problem of reaching equilibrium between these two tendencies is complicated by communalism. The division of Hindu society into hereditary castes, separated by insurmountable barriers, encouraged the growth of

[1] India covers 1,178,995 sq. miles, Pakistan 364,737 sq. miles. The 1961 censuses showed India with a population of 439,235,082 and Pakistan with 93,812,000.

communalism; it bred revolt in active-minded members of the lower castes against the financial or social domination of the higher castes. A similar attitude readily rooted in communities outside the Hindu fold, and found expression in religious intransigence.

Communalism

The Mughuls were foreign conquerors and compromise between their religion, Islam, and Hinduism, ultimately proved impossible. The Mughul Empire could not provide an adequate place for the Hindus, and it left India with a Muslim minority,[2] which, though mainly of the same race, finds political co-operation with Hindus difficult. The Muslims naturally felt that a powerful central government of a parliamentary type would be controlled by a Hindu majority, and that to preserve their culture and safeguard their interests, they must oppose the centripetal tendency. To strengthen the Local Governments at the expense of the Central Government would safeguard what they thought important, at least in those parts of India where they had a local majority.

Ultimately, Muslim feeling became so strong that, on the abdication of British authority in India, the only possible solution to these two antagonistic views was the division of the sub-continent into India and Pakistan, and this involved the disruption of three provinces of British India—Bengal, the Punjab, and Assam. Economically and strategically this division creates problems which a benevolent observer can only hope will be overcome by the joint efforts of statesmen of both countries. The division will do much to solve the communal difficulty, but even within the new India it is a problem which still has to be faced, a problem which admits of no rapid solution. In the absence of a careful and continuous policy calculated to convince Muslims that their religion, culture and economic prospects are in no danger, it is not likely that a Muslim who is an Indian citizen, aware of the Muslim country within the sub-continent, will feel less inclined to consider political problems from the communal angle than was a Muslim of what is now Pakistan during the days of British rule. Though it will be localised, the Sikhs in the Punjab may present India with another communal problem.

Possibly because success had followed the policy of treating the French-Canadians with due regard to their corporate feelings in an attempt to calm their apprehensions, during the British period,

[2] The 1941 census showed 318,776,000 Hindus and 42,691,000 Muslims in undivided India. In 1951, in India there were 300,320,000 Hindus out of a total of 361,129,622; in Pakistan there were 64,959,000 Muslims out of a total of 75,866,000. Owing partly to influx of Muslims into Indian territory adjoining Pakistan, the Muslim population of India increased from 35,414,000 in 1951 to 46,939,000 in 1961.

Muslims received separate representation and more seats in the Legislatures than their numbers would justify. This palliative could not prevent them being outvoted, and the inevitable result was a demand for similar treatment by other minorities such as the Sikhs, the Indian Christians, and the Outcastes. For a constitution of the type chosen by India to work satisfactorily, the majority must be mindful of the feelings of the minority, and the minority must be willing to accept the decisions of the majority. Communalism may *result in a minority putting its own views before the general good, in* an endeavour to enforce its views by unconstitutional action, and in political problems being determined on irrelevant grounds. It is claimed that proportional representation is one remedy for these difficulties, and India's Founding Fathers have introduced this into the Constitution as far as it is practicable, abandoning generally the principle of communal representation, but there are grave practical difficulties preventing the extension of proportional representation to illiterate voters.

Despotic pre-British rule

Though India now enjoys self-government, *i.e.*, control of its own affairs, and representative government, *i.e.*, it has institutions designed to bring executive and legislative action into relation with the will of the people, the Central Indian Government which came to an end in 1947 was not responsible to a popularly elected assembly. All previous Indian governments had been despotic, and the main Indian objection to the rule which ceased in 1947 was not that it was despotic, but that it was British. Despite the absorption of many Western political principles, the Indian, unless his judgment is obscured by nationalism or communalism, is prepared to concede that *the ruler must be given adequate powers to rule, and to act in emergencies.* We shall find, then, more willingness to entrust powers to the ruler than one would expect in a mainly British community, and an accentuation of the centripetal tendency.

In pre-British days in India the main functions of government were to collect the revenue, to maintain the armed forces, and to suppress rebellion. The Prince and his officials interfered little with the internal affairs of the country, so that a great deal of the ordinary work of government was done by villages and similar units, some of which had something approaching representative government, though *it would be difficult to trace any development from these to the* present Constitution. When the British first assumed political power in India, any form of government other than a despotism would have been incongruous.

The East India Company

When, in the seventeenth century, the East India Company commenced operations in India, it came, not for Empire, but for trade. The merchants chose a gentleman, Sir Thomas Roe, to represent them at the then powerful Mughul Court, and his advice to them was:

"Let this be received as a rule that, if you will profit, seek it at sea and in quiet trade; for without controversy it is an error to affect garrisons and land wars in India."

The Company's rivals, the Portuguese and the Dutch, and later the French, had other ideas, but initially the British were the more willing to accept Sir Thomas Roe's advice because their ships and armaments were unequal to their rivals'. Wars in Europe in the eighteenth century, however, set the Europeans in India at each other's throats, and impelled the rival traders to seek allies among Indian Princes. Once interference in Indian politics began, it was impossible to stop; the decay of Mughul power and the bids for independence made by the feudatories of the Empire hastened such interference. When in 1757 Clive defeated the *Nawab* of Bengal at Plassey, the rise of the Company as a political power became obvious. Though the *Nawabs* of Oudh and Bengal joined with the Emperor in an attempt to suppress the upstart, their defeat at Baxar in 1764 left no room for doubt that the Company was the leading political power in Northern India. Recognition by the Emperor was an obvious political asset. As a claim to hold by right of conquest would have enured for the benefit of the British Crown, though the Company was in a position to ask for what it pleased, it was obviously expedient to claim something less than full sovereignty. It was content with the grant by the Emperor in 1765 of the *Diwani* of Bengal, Bihar and Orissa, an imperial office, involving the right to collect the land revenue and the duties to pay fixed annual sums to the Emperor and the *Nawab* and to administer civil justice.

This involved a change from trader to administrator, not accomplished without difficulty. There was a regrettable period when the acquisitive instincts of the trader were so evident as to arouse apprehensions of misgovernment and the Company's insolvency, which prompted the British Parliament to impose increasing control over the Company's expanding activities and the British Government to select as Chief Executive in India noblemen without trade associations.

Adaptation of Western principles and institutions

The first steps taken to control the administration outside the Presidency Towns, where the Company's factories had been long

established, were not remarkable; the tendency was to confirm and supervise existing state organs of government. The new type of official introduced by Lord Cornwallis[3] was, consciously or unconsciously, less conservative, and he brought with him the British notion of the rule of law and the supremacy of contract over status. There was no intention to force British culture upon India. Up to the Mutiny, the theory which filled the minds of the progressives was the filtration into India of English ideas through educated Indians.

The policy was still generally to respect existing laws and institutions; innovations were to fill up gaps, not to supplant what existed and functioned, but indigenous institutions without the power of the State behind them were often overlooked and rendered impotent by the powerful organs of the new government.

Security on the borders, and safety for life and property within, were obviously the paramount considerations. A ruler can justify to his own conscience, and expect acceptance by the governed of much that is done to achieve these objects. Criticism of the ruler was not common in the eighteenth and early nineteenth centuries in India, and an English administrator might easily in this period equate what he thought good for India with what public opinion, if it existed, would approve.

Up to 1917 at least, constitutional history in India has nothing to do with the spontaneous growth of national institutions. "It is a record of experiments made by foreign rulers to govern alien races in a strange land, to adapt European institutions to Oriental habits of life, and to make definite laws supreme among peoples who had always associated government with arbitrary and uncontrolled authority."[4]

As the years of British rule passed by, the world's notions of the minimal duties of a government expanded. The sphere of government activity increased and the West alone could furnish precedents. India became an original member of the League of Nations; participation in this and other international gatherings involved the acceptance of laws and principles formulated by international agreement.

Results of British Administration

The results of British occupation have been the unification of India, the reception of many western notions of law and government,

[3] Governor-General, 1786–1793.

[4] Cowell, *History of the Constitution of the Courts and Legislative Authorities in India* (1872), p. 3.

the enactment of codes of law, the creation of an effective bureaucracy and legal system, the growth of a national army, and the rise of Hindu nationalism. During the Maurya period, Hinduism faced, retreated from and finally overcame the attack of Buddhism: it failed to reach accommodation with Islam, but its adherents have accommodated themselves to representative government, to religious toleration, to the rule of law, and, to a great extent, to the supremacy of contract over status.

In 1772, Warren Hastings, the first Governor-General in Bengal, issued a regulation for observance by the courts established by the Company under the powers given by the *Diwani* grant in 1765. It restored to the Hindu the right, which he had not had during the Muslim period, to have his personal law administered in court. The Hindu law had been administered mainly in private tribunals resembling boards of arbitrators, and developed by Brahmin writers. Now it was to develop by legal interpretation; hence the rise of the Hindu lawyer, assuming the mantle of the Brahmin jurist.

Lord Cornwallis, whose high principles were offended by the venality of the officials he met on assuming the office of Governor-General, substituted the new type of administrator, trained in England, and uncontaminated by contact with the Company's servants or Indian officials. It was a salutary reform at the time, but it involved the virtual exclusion of Indians, however able and ambitious, from the higher ranks of the administration. The experience of the Mutiny in 1857 demanded a security policy which long denied to Indians promotion to the higher ranks in the army. Even in the commercial world, British capital and the Briton, with his European training, his world connections, and his legacy from the East India Company, as the nineteenth century rolled by, seemed to the Indian to deny him his fair share in his country's trade.

The British Administration early felt the necessity of undertaking some measure of responsibility for education, but here, characteristically, officialdom was divided as to whether instruction should be provided in the Sanskrit and Persian classics, or on western lines. Lord Macaulay,[a] by a devastating minute, routed the Orientalists, and won the day for western education. His conclusion, rather than his reasons, was probably right, but the result was the creation of a class who were not always truly educated, and who valued education mainly as a passport to government service. Many were altogether disappointed, and many felt themselves inadequately rewarded. As Muslims were less willing to receive western instruction, they failed to get their proportionate share in public appointments; this later

[a] Law Member, Governor-General's Council, 1834–1839.

made it necessary to reserve fixed proportions for different communities in the public services, thus intensifying communal difficulties.

If government by foreigners and exclusion from public office made National Government the goal, western education, which involved a study of the literature of nineteenth century liberalism, pointed out the road. In North America, the earliest signs of democratic tendencies had been observed in local government, and Lord Ripon* hoped, by establishing local government boards, to establish training schools for Indians in parliamentary government, but the experiment has not yet succeeded. The politically-conscious Indian had a soul above parish-pump politics; he felt the resources of these bodies were too narrow, and official control of activity too strong. The effect on the development of local government bodies has been that they reflect local opinion less than they might have done. Administrative responsibility tended to be concentrated in the hands of a permanent official, and policy to be dictated from above. The centripetal tendency was encouraged.

Congress

It was the Indian National Congress which became the school of the Indian politician. The immediate occasion for its creation was the alteration of the rules applicable to candidates for the Indian Civil Service to the detriment of Indian candidates. An English civilian, Allan Hume, participated in its foundation in 1883. From modest beginnings it developed into a political entity of a kind India had never before known, and its Working Committee, though not susceptible of inclusion in the Indian Constitution, is a more powerful organ than any officially recognised. Though Officialdom approved its early efforts, Congress and the British Government soon became unsympathetic. In its early days, development of the representative principle in the higher councils of India, wider employment of Indians in the public services, more education, and a reduction of the military budget were its declared aims, but by the end of the nineteenth century, Government had refused to allow its servants to be members of Congress, and the lead had passed to the more extreme section, which gave it a Hindu bias, and led to the creation of the Muslim League.

In 1916 Congress and the Muslim League, though not invited to confer with the British Government, were able to agree on proposals which had some influence on the Montagu-Chelmsford reforms embodied in the Government of India Act of 1919. These reforms

* Governor-General, 1880–1884.

granted an appreciable measure of representative government, and provincial autonomy; some Indian liberal ministers exhibited statesmanship. But Congress rejected the reforms; its attitude until 1947 was generally that concessions by Britain were belated, inadequate, and unsuitable; the existing machinery of government must be brought to a standstill; it was for Indians to decide what form of government would suit them best. Nevertheless, they were reluctant to cut the tie with Britain, or even to define the precise meaning of their avowed aim, *swaraj*.

Provincial Autonomy

The shelving of the report of the Simon Commission, and the invitation of Indians to the Round Table Conference in 1929 ended the system of regulating political advance in India by inquiry and dictation from England, but the Prime Minister's undertaking at the end of the first session, " to secure such an amount of agreement as will enable the new Constitution to be passed through the British Parliament and to be put into operation with the active good will of the people of both countries " still implied the reservation of parliamentary judgment on what was good for India, especially on points where agreement could not be reached by Indians themselves.

Though the Act of 1935 evoked little enthusiasm in India, it further increased the autonomy of the Provinces and the powers of the Legislatures; not only did the Legislatures become almost wholly elective, but the Ministers became a Cabinet, and took over most of the powers hitherto reserved to the Governor; it was the foundation on which the Constitution was built. Congress achieved too remarkable a success at the polls to continue the programme of relentless opposition; eventually Congress Ministries were set up in six provinces.

These Ministries were, in varying degrees, both effective and competent, but, though constitutionally responsible to the Legislatures, they were bound by orders from the Congress Working Committee. The organisation, which had been the soul and mind of opposition to government, was now, for a time, the source of inspiration to constructive government action, but the declaration of war against Germany in 1939, which constitutionally involved India as a matter of course, without her opinion being considered, or her consent being obtained, revived the feeling that India was still tied to the wheels of the British chariot, and eventually, under orders from the Congress Working Committee, the Congress Ministers resigned, their powers vesting in the Provincial Governors. Only a bold prophet would assert that, with the passing of British control, an

institution such as Congress, with its long history of violent opposition to government, culminating in directorship of government policy, with its long roll of heroes and martyrs, with its power to dictate who should participate in politics and on what terms, will quietly abdicate in favour of political parties of the kind developed in Britain and America.

Party Politics

It is usually said that, for the successful working of a constitution such as India has adopted, a two-party system is desirable, the two parties being agreed on fundamentals and the party out of office always having available an alternative government. Though individual members of other parties have displayed remarkable ability, the only political party which has been able, and then only in one State and with no great measure of success, to provide an alternative government to Congress is the Communist party, which can hardly be regarded as fired with zeal for the maintenance of the Constitution or in agreement with Congress on fundamentals. But at each general election since independence, the electorate has clearly shown its preference for Congress.[7] Though there has been continuous Congress rule at the centre, it cannot be said that the Indian Parliament has failed in its task to secure ventilation of grievances and adequate discussion of public affairs. Indian experience during the past fourteen years suggests that the two-party system may have been more appropriate to the kind of parliamentary government found in England in the last century, when power to initiate and carry out policy was not exclusively vested in the Government, when the State had not become the omnipotent leviathan it now is and when the average voter was in a better position to pass judgment on alternative solutions to political problems than he is today. It would be difficult to maintain that India would have fared better in the period since independence under a succession of changing Governments than it has done under the continuous rule of Congress.

Indian Independence

The Indian Independence Act of 1947 meant the removal of British control and the expansion of what was left of the existing structure to fill up the gaps caused by that removal. The same policy has been to a considerable extent continued in the Constitution, which is no hasty improvisation. The Constituent Assembly came

[7] In 1952 Congress obtained 45 per cent. of the votes polled and won 364 out of 489 seats in the Lok Sabha. In 1957 Congress obtained 47·8 per cent. of the votes and 371 out of 494 seats. In 1962 Congress got 45·6 per cent. of the votes and 356 out of the 489 seats.

into existence on the ninth day of December 1946. Its members, representing what was formerly part of British India, were elected by the members of the lower or only houses of the Provincial Legislatures on the basis of, as nearly as possible, one member for each million of the population. Special representation was given to Muslims, and in the East Punjab to Sikhs. Representation of the Princely States was also fixed on the basis of one representative for a million of the population. In the case of the more important states, who were entitled to forty-nine representatives between them, at least half were to be elected by State Legislatures, or by electoral colleges constituted by the ruler. The forty-nine representatives of the remaining states were all elected. Relevant extracts from the other constitutions of the world were published and considered. General principles were thrashed out, and special committees were appointed to consider and report on particular parts of the Constitution. These reports and the resolutions of the Constituent Assembly were then collated, and on July 29, 1947, a drafting committee, under the chairmanship of Dr. Ambedkhar, was appointed to scrutinise and revise the Draft Constitution prepared by the Constitutional Adviser, Sir B. N. Rau. The committee presented its report on February 21, 1948. Members then tabled amendments, which were debated and voted upon as the Constitution was enacted clause by clause. The Constitution was finally passed on November 26, 1949, and came into force on January 26, 1950.

The Constitution

A comparison of the Constitution with the 1935 Act shows no evidence of revolt against the laws and institutions introduced by the British; the revolt was mainly against tutelage, dictation, and what was regarded as undue sympathy for British trading interests. There is much of fulfilment and little of rejection of British policy. Happily there have always been Englishmen who realised and said that English domination of India was a passing phase, and much British policy has been founded on this premise. To have laid down the crown and sceptre, but to have left behind British laws and institutions, and to have retained India within the Commonwealth, will go far towards securing for the British Empire in India a favourable verdict at the bar of History.

The British practice of making the Executive responsible to the Legislature has been combined with a Constitution, federal in form, which derives from the American model, but with features which suggest that the tendency in all federations to concentrate power at the centre may make more rapid progress than in America or

Australia. The Constitution at its inception was, perhaps, more federal than Canada's, certainly less federal than Australia's, but it does not follow that future developments in India will follow roads parallel with those to be taken in those parts of the Commonwealth inhabited by persons of mainly British origin, where the original settlers were disposed to begin where they had left off in Britain.

The Princely States

Those parts of India governed during the British period by Indian Princes occupied roughly half of its total area, and numbered roughly one-third of its total population. The Company originally negotiated with the Princes on terms of equality, but, as its power grew, it drove harder bargains, and ultimately the paramount power asserted that all treaties and agreements were modified by changed circumstances, and by its practice in dealing with the states as a whole, though the internal affairs of his state were largely a Prince's own responsibility. There survived in some of the states a despotic type of government, and no state had progressed along the road to responsible government so far as had British India.[a] Criticism of the Princes was suppressed in the states, and circumscribed by law in British India. Developments in British India made the Princes momentarily disposed to favour joining the Federation contemplated in the Act of 1935, but eventually none took this step. When independence came the Princes were urged to federate, surrendering powers over foreign affairs, armed forces and communications. They were subsequently induced to send their representatives to the Constituent Assembly, to be bound by its decisions and to make even greater concessions.

Many states had little experience of the kind of government which had been developed in the British Indian provinces and there were not readily available officials competent to undertake such an administration. Nevertheless, it became obvious that the new rulers would not tolerate what it regarded as medieval forms of government and were bent on creating a uniform system and uniform standard of administration throughout India. Though the Constitution, at its inception, preserved in the Part B States something of Princely India, this was only a temporary reprieve. Like foreign states claiming territorial sovereignty in India, their alternatives were to go quietly or submit to force. The States Reorganisation Act, 1956, and other similar legislation has redrawn India's internal boundaries, mainly on a linguistic basis. Except in a few awkward small corners, there is

[a] In 1942 states representing 72 per cent. of the total population of the states, had Legislative Assemblies, and in states representing 35·3 per cent. of the population elected members were in the majority: Statement in Chamber of Princes, November 17, 1942.

a uniform system of administration and Princely sovereignty has vanished. Whatever regrets may be expressed about it, Princely India is no more.

Development of the Constitution

History, even the history of the Indian sub-continent, records constitutions which, on paper, if not admirable, at least appeared free from serious defect and which, instead of becoming permanent active instruments of government with a capacity for growth, have been abandoned. The world today has constitutions, admirable on paper, which are only partially or spasmodically enforced; at best they are blueprints of what some citizens hope their future constitution will be. There are other constitutions drafted in grandiloquent terms, which are merely a smoke-screen, behind which a political party or ruling clique pursues its own destiny. To none of these categories does the Indian Constitution belong. The instrumentalities of government which it has created endeavour to abide by it and the laws made under it; the Supreme Court rules on doubtful points and other organs of state accept the court's ruling. But when the Constitution came into force in 1950, this could not have been guaranteed. The Constitution has, not without reason, been criticised for its length; it does contain provisions which might have been left to the ordinary process of legislation. But it has left gaps to be filled by the Legislatures and left many principles to be elucidated by the courts. Whereas in 1950 a commentator on Indian constitutional law might have restricted himself, for the most part, to observations on the Constitution itself; that is only the foundation and the superstructure now calls for his attention. Conventions, not referred to in the Constitution or enforced by the courts have been established, sometimes with sanctions for their observance, and these are not necessarily those observed in other parts of the Commonwealth. There is already a large volume of case law, which has a persuasive authority outside India. There have been sixteen Acts amending the Constitution and there are many other Acts coming within the scope of constitutional law. In some cases Parliament has checked a constitutional development adumbrated by a decision of the Supreme Court.

Good laws are more often grown than made. A constitution will flourish if it aids progress to those social and political goals which the majority of politically conscious citizens desire. Political leaders have demonstrated their respect for the Constitution by staunch observance of the Directive Principles, though they are not legally binding on them; Indian citizens generally seem to regard the Constitution with reverence.

India's place in the Commonwealth

Though India is a Republic, she remains a member of the Commonwealth. Indians do not bear allegiance to the Crown, but the Queen is recognised as the symbol of the free association of the members of the Commonwealth. The status of India differs *de jure* from the status of the older members of the Commonwealth, not only with regard to allegiance, but also with regard to subordination to the Government and Parliament of the United Kingdom. Though the Statute of Westminster generally releases Dominion Legislatures from subordination to the Parliament of the United Kingdom, and though the possibility of the United Kingdom Parliament deliberately passing an Act affecting a Dominion is too remote for serious consideration, the question might arise as to the validity of an Act, passed by the United Kingdom Parliament, which inadvertently conflicted with the Statute of Westminster; it would seem that a court in the United Kingdom would be obliged to hold that, as the United Kingdom Parliament was omnicompetent, the later Act must prevail. Such a situation could not arise with regard to India; her Legislatures are subordinate only to the Constitution.

Three centuries of intercourse have given Englishmen and Indians much in common in modes of thought, economic activity, laws and institutions. The late Mr. J. H. Nehru said, "The Commonwealth with all its imperfections represents a system of international co-operation," and "It is not desirable to break contacts and seek isolation." By *remaining within the Commonwealth, India enjoys the right to be* represented at Commonwealth conferences, and the right to be consulted and kept informed on Commonwealth matters. Decisions at Commonwealth conferences are not binding on her against her will. *No treaty with a foreign power, and no declaration of war by another* member of the Commonwealth binds India without her express consent. India continues to enjoy Commonwealth preference in the manner of tariffs, and Indians enjoy the rights they had in the Commonwealth countries before the inauguration of the Republic. Doubtless it was past associations, community of economic and strategic interests, community of political faith, and the fear of isolation which induced India to remain in the Commonwealth.

It has been said that, by remaining a member of the Commonwealth, India has betrayed the struggle of colonial peoples against exploitation; it is submitted that India, with her experience of the irksomeness of domination, and of the unanticipated consequences of its removal, has a clearer vision of the problem of raising the status of colonial peoples, and has something to contribute to the solution of this problem. She has a majority of the total population

of the Commonwealth, and her place in the Commonwealth will be what she and the other members make it. The Constitution of the Commonwealth demands at present few obligations of its members; it is for the individual members to decide if it is to their advantage to add to them; its future depends upon the acceptance and faithful discharge of mutual obligations.

PART ONE

THE CONSTITUTION

CHAPTER 2

THE DEVELOPMENT OF THE CENTRAL AND PROVINCIAL GOVERNMENTS AND LEGISLATURES DURING THE BRITISH PERIOD

Government of the East India Company's Settlements

The Indian Constitution is a logical development, conditioned by India's history preceding its creation, from the constitution established by the Government of India Act of 1935, the last important measure in a succession of Acts of the British Parliament creating machinery for the government of India. We must, therefore, trace briefly the course of the development of the Central and Local Governments and legislatures from the factories established by the East India Company.

At the time of the battle of Plassey (1757), the East India Company's principal settlements were in the three Presidencies, Calcutta, Madras and Bombay. Under a succession of charters from British sovereigns, the Governor and Council in each settlement, though responsible to the directors of the Company, had wide powers of government within the settlement. Only in Bombay, which Portugal had ceded by the marriage treaty of Charles II, did the British Crown exercise sovereignty. Plassey obliged the Company to restore order in Bengal; such legal right as it had to do so was based on the *Diwani* grant from the Mughul Emperor Shah Alam in 1765, though strictly this did not justify more than the collection of the revenue, and the administration of civil justice, as agent of the Emperor.

The British Parliament assumes responsibility

The British Parliament was led to interfere in the administration by the Company in Bengal by apprehensions as to the Company's financial stability, and the ostentatious display of wealth of returning servants of the Company at this period. The Regulating Act of 1773 raised the status of the Governor in Calcutta to Governor-General in Bengal, and enlarged his Council to four. With the object of further securing control by the Government of the United Kingdom over affairs in India, a Supreme Court was set up in Calcutta. The immediate result of this measure was to make the Governor-General often powerless before his own Council, which could and did outvote him, and the Council sometimes impotent before the Supreme Court,

which could veto its legislation and frustrate its executive acts, but most of the mischievous features of the Act were removed by an Act of 1781.

Pitt's Act of 1784 created a board of control through which the British Cabinet could control the directors of the Company, and by practice and convention the powers of the board were gradually concentrated in the President, a member of the Cabinet. An Act of 1786 gave the Governor-General in Council effective control over the other two Presidencies, and empowered the Governor-General to override his Council,[1] which the Act of 1784 had reduced to three.

The birth of the Central Legislature

The Charter Act of 1813 asserted the sovereignty of the British Crown over the territories held by the Company in India. The Charter Act of 1833 created the office of Governor-General of India, and established the embryonic All-India Legislature. Prior to this, the Governor in Council had legislated in each province by "Regulations," so that the English law enforced by the Supreme Courts in the Presidency towns[2] differed from the law enforced in the districts outside the Presidency towns by the Company's courts, and the Regulations of the different Provinces were unnecessarily discrepant, so that the need for a more uniform system of laws was pressing. Power to legislate by Regulation was withdrawn from the Presidencies, and a fourth (law) member was added to the Council, but with power to vote only when the Council was engaged in legislation.

The Charter Act of 1853 continued the process of separating the Legislature from the Executive. The Company's territory had by this time expanded considerably, and the North-West Provinces (now Uttar Pradesh) had been placed under the control of a Lieutenant-Governor, a precedent which was to be followed as further acquisitions made it necessary. The Governor-General was relieved of direct responsibility for Bengal by the appointment of a Lieutenant-Governor for that Presidency. The Act added two English judges from the Calcutta Supreme Court, and representatives of each Governor and Lieutenant-Governor to the existing Executive Council to make a Legislative Council.

The new Legislative Council, which modelled its procedure on the House of Lords, set an example to its successors by becoming so independent and inquisitive as to provoke complaints from a Governor-General and the British Cabinet that it gave itself the airs of a "petty parliament" and "grand inquest of the nation." The

[1] This reserve of power, like most others of a similar nature in later Acts, was very seldom used.

[2] Supreme Courts were set up in Madras in 1801 and in Bombay in 1823.

other Provinces complained that Bengal was over-represented and their legislative requirements were inadequately met.

The birth of the Provincial Legislatures

In 1861, therefore, the Indian Councils Act, while enlarging membership of the Central Legislature to not less than six, nor more than twelve additional members, of whom half were to be non-officials, restricted the activities of the Legislative Council to legislation only, made the previous sanction of the Governor-General necessary to the introduction of certain measures, and empowered him to veto Bills or reserve them for consideration by the Crown. The same Act restored legislative power to the Councils in the Presidencies, and enabled the establishment of other Provincial Legislatures, by the addition of Legislative Councillors to the Provincial Executive Councils. It was held in *R.* v. *Burah*[3] that, with regard to those matters on which the Councils had been given power to make laws, except in so far as those powers were circumscribed by the Act of the British Parliament which gave those powers, the Councils had plenary powers as large as, and of the same kind as the British Parliament.

After the Mutiny, the Act of 1858 vested the Government of India in the Crown; the Court of Directors of the Company disappeared, and the President of the Board of Control was succeeded by the Secretary of State for India, assisted by an Advisory Council. The Secretary of State was responsible to Parliament, which, however, exercised little control. The establishment of telegraphic communication with India made it possible for the Secretary of State to exercise stricter control, but by convention it was unusual to interfere with the acts of the Governor-General in Council or dictate except in extreme or unusual circumstances.

The birth of Cabinet Government

The Act of 1861 empowered the Governor-General to legislate by ordinances which were to have the same authority as Acts of the Legislative Council. It also empowered the Governor-General to make rules for the transaction of business, which enabled Lord Canning[4] to introduce the portfolio system into the Executive Council. Instead of the Executive Council dealing collectively with every item of business within its competence, responsibility for all but the more important points on specific subjects was delegated to individual members of the Executive Council. This was the first step on the road to Cabinet government.

[3] (1878) 3 App.Cas. 889.
[4] Governor-General, 1856–1862.

As government business increased, additional members were added to the Executive Council, so that by 1919 it consisted of six members besides the Commander-in-Chief. The Governor-General himself retained the portfolio for Foreign Affairs and relations with Indian Princes. The other portfolios were Home Affairs, Revenue, Finance, Legislation, Commerce and Industry, and Education. Though as early as 1862 three distinguished Indians had been appointed to the Central Legislative Council, it was not until 1909 that the first Indian, Mr. S. P. (later Lord) Sinha, was appointed to the Executive Council.

Growth of the Legislatures

The size and powers of the Legislatures were enhanced by the Indian Councils Act, 1892. They were empowered to discuss the Budget, and to put questions to Executive Councillors. At the Centre, the maximum number of additional members was increased to sixteen; in the three Presidencies, the corresponding number was twenty, and in the North-West Provinces fifteen. As a partial concession to a demand from Congress, four of the additional members at the Centre were elected by the non-official members of the Provincial Legislatures, and some of the additional members of the Provincial Legislatures were elected by Municipalities, District Boards, Chambers of Commerce, and Universities.

The Morley-Minto[5] Reforms embodied in the Government of India Act, 1909, increased the number of additional members in the Central Legislature to sixty, of whom twenty-seven were elected, partly by the non-official members of the Provincial Legislatures, and partly by such special constituencies as landowners and chambers of commerce. Similar enlargements were made in the Provincial Councils, but, except in Bengal, an official majority was ensured. In response to Muslim demands, the principle of communal representation was conceded; they were represented by special representatives selected by them alone. The Legislatures were further empowered to move resolutions on the Budget, and, with the exception of specified topics such as the Armed Forces, Foreign Affairs, and Princely States, on any matter of public interest.

Dyarchy: the first step towards responsible government

Though politically conscious Indians might feel that each advance was too short and too late, and though Lord Morley expressly repudiated any intention of establishing parliamentary government in

[5] Lord Morley, Secretary of State for India, 1906-1910; Lord Minto, Governor-General, 1905–1910.

India, it is clear, comparing the response with the demands of Congress, which were based on constitutional developments in the British self-governing colonies,, that events were moving in that direction. There was, however, reluctance to define the goal of the British Parliament's policy in India until India's effort in the war of 1914–1918, and the demands of Congress and the Muslim League drew from the Secretary of State, Mr. Montagu, in 1917, the announcement that the object was to secure the increasing association of Indians in the administration, the gradual development of self-governing institutions, and the realisation of responsible government within the British Empire.

The Montagu-Chelmsford Report[1a] which followed recommended popular control of local bodies. While progressive realisation of representative government should commence with an immediate grant of some responsibility in the Provinces, the Central Government must remain supreme in essential matters, and responsible to the British Parliament. The Provinces were to be as independent of the Centre as possible; the Legislatures were to be more representative and influential, and the control of the Secretary of State was to be progressively relaxed.

The Government of India Act, 1919, created a bi-cameral Central Legislature. The lower chamber, the Legislative Assembly, ultimately consisted of one hundred and forty-five members, of whom twenty-six were officials, fourteen nominated non-officials, and one hundred and five elected. The upper house, the Council of State, consisted of sixty members of whom twenty were officials, and thirty-five were elected. There was now an elected majority in both houses. Communal representation was continued, and the franchise was restricted to persons with a somewhat high property qualification. Ordinarily the Legislative Assembly had a tenure of three, and the Council of State of five years, but the Governor-General could dissolve either house earlier, or extend the duration of their tenure.

Subject to the previous sanction of the Governor-General to the introduction of measures on specified subjects such as the public debt, discipline of the armed forces, relations with foreign Powers and Princely States, the repeal of existing laws, and matters within the competence of the Provincial Legislatures, the Central Legislature could enact laws for the whole of British India, for British subjects and servants of the Crown in India, and for British Indian subjects outside India. In case of disagreement between the houses, a joint sitting could be called.

The Governor-General could return to the Legislature for further consideration any Bill passed by it, or he could veto it. If the

[1a] Lord Chelmsford, Governor-General, 1916–1921.

Legislature rejected a Bill, he could certify that it was essential to the safety, tranquillity or interest of any part of India, whereupon it would become law. He retained the right to legislate by Ordinance in emergencies, such Ordinances to have the force of law for six months.

The Budget or Annual Finance Statement, and the Annual Finance Bill, were introduced by the Finance Member of the Governor-General's Executive Council. No proposals for appropriations could be made except on the recommendations of the Governor-General; expenditure under certain heads, such as political,* defence, interest on loans, and salaries and pensions of persons occupying certain superior government posts was not subject to the vote of the Legislature, but permission to discuss them was, by convention, always given. Discussion of the Finance Bill was permitted in both Chambers, and required the consent of both, but the power to grant supplies was with the Assembly. The exercise of this power as a political weapon was, however, limited by the power of the Governor-General to restore grants which the Assembly had refused on a certificate similar to that necessary to give legal effect to a rejected Bill.

A greater advance was made on the defined road in the Provinces. Before the Act came into force, there were, in addition to the three Presidencies, four Lieutenant-Governorships, the United Provinces, the Punjab, Burma, and Bihar and Orissa, two Chief Commissionerships, the Central Provinces, and Assam, as well as minor charges, which included the North-West Frontier Province. Each of those specifically named became a Governor's Province, though Burma not until 1923, and the North-West Frontier Province only in 1932.

Despite the general supremacy of the Centre, responsibility for certain subjects was delegated to the Provinces, but these subjects were divided into two categories, an experiment, also tried in Malta, which was nicknamed "Dyarchy." The "reserved" subjects, irrigation, European education, land revenue, famine relief, police, newspapers, prisons, provincial loans, forests (except in Bombay and Burma), and factories were under the administrative control of the Governor's Council, of four members or less. The "transferred" subjects, local self-government, public health, Indian education, public works, agriculture and fisheries, co-operative societies, excise, forests (in Bombay and Burma), and industrial development were under the control of ministers, who, though selected by the Governor, were responsible to the Provincial Legislature. In the reserved field,

* This was the name then given to the department responsible for relations with the Princely States.

the Governor and his Council were bound to obey the orders of the Central Government.

Each Province had a triennial single-chamber legislature, consisting of from fifty-three members in Assam to one hundred and thirty-two in Madras. The franchise was granted to all who paid a comparatively small amount in rates or taxes.[1] Women were enabled to vote at elections for all Legislatures created by the Act, except the Council of State.

While, in the transferred field, there was a considerable degree of control by the elected Legislature, its powers, and the Ministers', were trammelled by financial arrangements. The Governor could restore a demand for a grant refused by the Legislature; he could certify a rejected Bill on a reserved subject as essential for the discharge of his responsibility for that subject, whereupon it would normally be laid before the British Parliament before being presented for the King's assent, but it became law immediately if he further certified a state of emergency. The Governor could also stop discussion on any Bill.

Development of the Indian Financial System

Allotting to a political unit responsibility for a particular matter, without the right to funds to discharge that responsibility, is only a nominal grant of power. The degree of autonomy enjoyed by a unit of a federation depends less on the variety of subject-matter under its control than on the degree of financial autonomy. It is therefore of some importance to trace the development of the revenue system in India. Before 1833 each Presidency was financially independent, but the Charter Act of that year vested all financial powers in the Centre, revenues collected in the Provinces being credited to the Central Government, which made grants to the Provinces, not necessarily to each according to its need and sometimes on the principle that if the child does not cry the mother will give it no milk. In 1870 the Provinces were made responsible for education, medical services, gaols, police, registration, roads and public buildings, the cost to be met from fixed annual grants, which Provinces could distribute between these heads at discretion. Seven years later responsibility for land revenue, excise, stamps, general administration, law and justice was delegated to the Provinces, which were entitled to retain a percentage of the receipts under these heads; as most of them were productive of revenue, improvement in collections followed. In 1882 some heads of revenue were assigned to the Centre, others to Provinces; there remained the category of divided

[1] *e.g.*, payment of Rs.3 annual Municipal Tax qualified in Madras.

heads, the net collections from which were divided between the Centre and the Provinces in proportions fixed at quinquennial settlements until 1904, when they became permanent.

The Provinces were not ordinarily liable to contribute to war expenses but famine was originally a provincial responsibility. From 1884 Provinces were required to maintain minimum balances to cover famine relief. In 1904 the Famine Insurance Scheme was established; the Centre placed to the credit of each Province a sum on which it could draw, expenditure beyond that being equally divided between the Centre and the Province. In 1917 famine became a divided head of expenditure, being met by the Centre and the Province in the proportion of three to one. In 1920 famine again became a provincial matter.

Before the Government of India Act, 1919, came into force, the Centre's main responsibilities were defence, railways, posts and telegraphs, interest on debt and charges incurred in England. Its main sources of revenue were customs, railways, posts and telegraphs, salt, opium, and tribute from Princely States. Provincial receipts came mainly from forests, fees for registration of documents and courts. The principal divided heads were land revenue, stamps, excise, income tax and irrigation works. Before the Act of 1919 came into force the Indian budget included the provincial budget and required the approval of the Secretary of State before submission to the Legislature. The Provinces had no borrowing powers and their powers to sanction expenditure were limited by codes and directions issued by the Centre and the Secretary of State. The Centre usually allowed each province what it thought necessary and took the rest.

While, under the Act of 1919, there was no apportionment of revenue between reserved and transferred subjects, divided heads were nominally abolished, income tax, opium, salt, customs, mint, posts and telegraphs, railways and excise, other than from alcohol and narcotics, being allotted to the centre and all other sources to the Provinces, together with a share in increases in income tax collections But the Provinces were to make annual contributions to the Centre; these were to be progressively reduced and finally abolished. It had been assumed that the Provinces would have surpluses, out of which the contributions could be paid. As these did not materialise, provincial contributions were abolished in 1927. The Provinces maintained that their share was inadequate; the Centre with a steady expenditure had taken the sources with receipts likely to expand; ministers in charge of social services inevitably increased expenditure, while provincial sources of revenue were unlikely to expand. Some Provinces had done better than others; agricultural Provinces were

better off than industrial Provinces, who had no power to tax industry.

Under the Act of 1919, the Indian Legislatures did secure some control over financial business through their standing finance committees and committees of public accounts, with majorities of elected members, who considered proposals for new expenditure, suggested economies and checked appropriations but the sanction of the Secretary of State was still required for interference with the salaries of officials in the higher posts and proposals for expenditure could only emanate from the Finance Member, responsible to the Secretary of State, whose approval of the central budget was still essential. He also controlled exchange and currency policy. Though an Act of the British Parliament was still required to authorise a sterling loan, the Provinces could now borrow in India with the consent of the Centre and, to raise funds for capital expenditure on projects of permanent utility, irrigation or famine relief, outside India with the consent of the Secretary of State.

The birth of Federation

The Act of 1919 disappointed the hope that it would serve for at least ten years. Congress rejected it, and Hindu-Muslim tension increased. In 1927, therefore, the first step towards the enactment of a new constitution was taken by the appointment of the Simon Commission, but this at once provoked the cry that it should be for Indians, not the British Parliament, to frame the constitution. An all-parties conference in 1928 appointed a committee with Pandit Motilal Nehru as chairman to draft a constitution. Its report recommended that India should become a commonwealth with the same constitutional status as the older dominions, in which sovereignty, derived from the people, should be exercised in accordance with the constitution. No religion should be endowed by the State and men and women should have equal rights. There should be a bicameral parliament at the centre. Members of the senate should be elected by provincial councils, using the method of proportional representation with the single transferable vote, the 200 members being divided among the Provinces on the basis of population. The 500 members of the house of representatives should be elected by all citizens who had attained twenty-one. Seats should be reserved for ten years for Muslims in proportion to population in Provinces with a Muslim minority and for non-Muslims in N.W.F. Province. Parliament should be empowered to legislate on all subjects not assigned to the Provinces. The central executive should be collectively responsible to parliament; it would consist of a prime minister, appointed by the governor-general and five other ministers appointed on the prime

minister's advice. Each Province would have a legislature with as many members as there were multiples of 100,000 in its population, elected by citizens of twenty-one or over. There would be no reservation of seats in the Punjab or Bengal; in other Provinces with Muslim minorities, seats would be reserved for them on a population basis and for non-Muslims in N.W.F. Province reservation would continue for only ten years. The provincial executive council would consist of a chief minister selected by the governor and four others appointed on his advice. The supreme court would exercise jurisdiction in proceedings to which the Commonwealth was a party, in proceedings between provinces and in constitutional questions. The commonwealth would assume the right and obligations of the Government of India towards the Princely States; any dispute arising from a treaty or agreement could, with the consent of the State concerned, be referred to the supreme court.

This report seems to have been well received by politically conscious Indians; European opposition to it seems to have been largely based on the assumption that it was only intended as a stepping-stone to severance from the British Commonwealth. In October 1929, Lord Irwin,* as he then was, announced that the goal of British policy was dominion status, that the problem of the Princely States must be dealt with, having due regard to their treaties and that a Round Table Conference would be called to consider these matters. In 1930, 1931 and 1932 the Round Table Conference was held in London, but Congress was only represented at the second session, and then by Mahatma Gandhi alone. The British Government prepared a White Paper which was submitted to a Joint Select Committee of the British Parliament, and its report was the basis of the Act of 1935.

The Act of 1935 contemplated a federation including the Governor's Provinces and the Princely States. While this would involve a grant of powers from the Crown to the Provinces, the Princely States would, in the exercise of their own volition, accede to the Federation, if at all, on terms to be agreed between them and the Crown, involving a surrender of part of their sovereignty, for re-assignment to the Centre. The normal process of federation is assumed to be the surrender by independent units of part of their sovereignty to a newly created Central Government, but the method of dealing with the Provinces in 1935 was not without precedent. Constitutions, federal in form, had been created by the grant of powers from above to parts of the State in Argentina, Brazil, Mexico, Venezuela, and by the Austrian Constitution of 1920. It seems

* Governor-General, 1926-1931; subsequently Lord Halifax.

arguable whether the normal process was followed in America, for the original United States, when they repudiated British allegiance, united in a Confederacy which continued until the Federal Constitution superseded it.

Provincial Autonomy: the Executive

As no Princely State acceded during the British period, the Federal part of the Act never came into force, and the important developments started by the Act were in the Provinces. It created eleven autonomous Governor's Provinces, Madras, Bengal, Bombay, the United Provinces of Agra and Oudh, Bihar, the Central Provinces and Berar,[9] Assam, the North-West Frontier Province, Sindh, Orissa and the Punjab.

The executive authority of a Province was exercised on behalf of the King by the Governor, in whose name all executive action was taken, but, with important exceptions to be noted, the Governor was to act on the advice of a Council of Ministers, who, though chosen by him in his discretion, would cease to hold office if for a period of six months they were not members of the Provincial Legislature. The Governor in his discretion could preside at the Council of Ministers.

The Ministers were responsible to both Chambers of the Legislature, which could by resolutions and votes of no confidence, secure to a considerable degree the enforcement of the will of its majority. Although the Legislature could fix the salaries of Ministers, the parliamentary device of securing discussion of a Minister's policy by proposing a cut in his salary was excluded by a provision forbidding changes in a Minister's salary during his term of office.[10]

Inevitably a Ministry had to be able to command the support of the Legislature, but the Instrument of Instructions issued to each Governor, while it required him to select Ministers from the majority party in the Legislature, after consulting its leader, also required him to include Ministers representing minority communities. To abide by the instructions without turning the Ministry into a "fortuitous political Noah's Ark" was a difficult task.

The Instrument of Instructions, which directed the Governor how to exercise the powers vested in him by the Act, was a device borrowed from colonial practice. It had the advantage that its contents

[9] Berar, though part of H.E.H. the Nizam's dominions, had, since 1853, been administered as part of British India, under an arrangement which relieved the Nizam of liability to pay a subsidy. Under the Act, the Central Provinces and Berar were to be administered as one Province, but the Governor had a special responsibility to secure a reasonable share of the revenues for Berar.

[10] During the "Dyarchy" period, motions to reduce Ministers' salaries had been moved on personal or frivolous grounds.

could be changed from time to time, keeping pace with political developments, so that the working of the Constitution could be changed without recourse to legislation. In that the Indian Instruments of Instructions required the approval of the British Parliament, there was a departure from colonial practice.

The Provincial Governor's reserve of power

The powers of the Ministers were trammelled by the "safeguards." The Act imposed on the Governor a special responsibility for certain matters, and required him to act in such matters in accordance with his own individual judgment. Regarding other matters, he was required to act in his discretion. As these reservations of power had to be precisely defined, they occupied sufficient space in the Act to give the impression that they were more formidable than they were meant to be. Mainly, they were intended to deal with insurrection, with situations which made it impossible to work the Constitution in whole or in part, and to prevent action inimical to persons and communities towards whom the British Government had recognised obligations.

In matters for which the Governor had a special responsibility, he was not obliged to consult his Ministers; his functions with regard to such matters would chiefly be exercised through officials acting under his orders. They included the prevention of grave menace to the peace of the Province, the protection of the interests of minorities, of the rights of the public services, and of the Princely States, the execution of the Governor-General's orders, and the prevention of discrimination against British trade.

In the discretionary field, the Governor was obliged to consult his Ministers, but not to accept their advice; his functions within this field would normally be exercised through his Ministers. They included the choice and dismissal of Ministers, summoning, proroguing, and dissolving the Legislature, assent and reservation of Bills, and measures to deal with terrorism. If, in the Governor's view, terrorist activities endangered the peace of the Province, he could direct that any of his functions to the extent specified would be exercised in his discretion.

Though he was bound to obey any directions received from the Governor-General, it was for the Governor to decide, in any particular case, whether to act on his individual judgment or in his discretion. Every Secretary to Government was therefore obliged to bring to the notice of his Minister, and every Minister to the Governor, any matter likely to involve the Governor's special responsibilities, so that it became necessary to establish a Governor's secretariat to deal with matters outside the ministerial field.

In a sense, therefore, the division between the transferred and reserved spheres still remained, but the boundary was no longer immutably fixed as under the 1919 Act. As ministerial government acquired efficiency, the discretionary field could be contracted by developing a convention that the Governor should accept ministerial advice, and by orders in the Instrument of Instructions that he should do so. It was hoped that the need for the exercise of these reserves of power would grow progressively less.

The Provincial Legislatures

The new Provincial Legislatures were bicameral in Madras, Bombay, Bengal, the United Provinces, Bihar and Assam, but consisted of a single chamber in the other Provinces. There were grounds for believing that at least an important section of local opinion favoured a second chamber in Bengal, the United Provinces, and Bihar. Madras and Bombay received second chambers on the ground that conditions in these Provinces resembled those in Bengal, but this could not have been said of Assam, and the British Parliament seems to have acted on the view that a body of elder legislators, with experience and material interests, was necessary to check the more capricious actions of a popular legislature.

Provided that financial resources make it feasible, a second chamber may fulfil purposes which make it as desirable in a Province as at the Centre. Its members should be less obliged to press sectional interests than the members of the popular assembly, who are under a heavier obligation to conform to the wishes of their constituents, so that, in debate, the members of the second chamber should be in a position to take broader views, and exercise their private judgment more freely, especially as a defeat of the Government in the second chamber does not involve its resignation. The freedom of action of a member of the lower house is not only circumscribed by the views of his constituents, but also by party discipline, which the Ministry may use to coerce him; this is less effective in the second chamber, which may therefore be in a position to check ministerial dictatorship in the Legislature. The Commonwealth view generally is that a second chamber's function is not to veto legislation of which it disapproves, but to delay its enactment, particularly when it involves new principles of legislation, until public opinion has definitely pronounced in its favour. Non-controversial Bills can be introduced in the second chamber, where they can be adequately treated, and shaped into an acceptable form, so that the popular chamber will have more time available to deal with controversial matters. The second chamber can also rectify errors and omissions due to the heat of debate in the popular chamber, and

the application by the Ministry of parliamentary devices[11] to secure the passage of a Bill within the time they are prepared to allot to it by limiting the length and field of debate.

In the Provinces which had one, the upper chamber was called the Legislative Council, and remained permanently in being, but one-third of its members retired and were replaced every three years. The lower or only house was called the Legislative Assembly, and was to be re-elected every five years, unless dissolved earlier. The Legislature was to be summoned once a year, and within twelve months of the end of its previous session.

Finance Bills, *i.e.*, Bills imposing taxes, or directing expenditure out of provincial revenues, or dealing with the borrowing of money, could only be introduced in the Legislative Assembly. Other Bills could be introduced in the Legislative Council if there was one. If the Legislative Council failed within twelve months to pass a Bill passed by the Legislative Assembly, the Governor, acting in his discretion, could summon a joint sitting, at which a majority of those voting could put an end to the deadlock.

The Budget was presented on the recommendation of the Governor, and was in two parts. The first part was a statement of expenditure charged by the Act on the provincial revenues; it included the salaries and allowances of the Governor, the Ministers, the Advocate-General, and the Judges of the High Court, and provincial debt charges. The second part gave details of other proposed expenditure. The items in both parts, except the Governor's salary and allowances, could be discussed in either chamber, but the items in the second part only were votable, and by the Legislative Assembly alone.

As will be seen later, the provincial legislative field was a wide one, but the reserve of power exercisable over the Legislature did not commend itself to advanced Indian opinion. Apart from the Governor's power to veto a Bill or reserve it for the consideration of the Governor-General, the Governor could return a Bill passed by the Legislature for consideration of amendments suggested by him. The previous sanction of the Governor-General was required before any Bill could be introduced in the Legislature which was repugnant to an Act of the British Parliament, or the Governor-General's legislation, or which affected the discretionary field of the Governor-General, or which affected criminal procedure in respect of Europeans.[12]

[11] Such as the closure, the guillotine and the kangaroo, discussed at p. 136.

[12] The European community attached excessive importance to the principle that Europeans should be tried by Europeans. In 1883 there was successful agitation in India and England against a Bill drafted by Ilbert the Law Member, to withdraw this privilege. Most privileges of this nature were abolished in 1923.

Similarly, the previous sanction of the Governor was necessary in the case of a Bill repugnant to a Governor's Act or Ordinance, or affecting an Act relating to the police. The Governor could stay proceedings on any Bill, before or after its introduction, on a certificate that it, or any proposed amendment, affected the discharge of his special responsibility for the peace of the Province.

The Governor could, in an emergency, if the Legislature were not in session, legislate by Ordinance; this would be as valid as a Provincial Act until withdrawn, or until six weeks after the re-assembly of the Legislature, if that body disapproved of it. To enable him to act immediately in a matter requiring the exercise of his discretion or individual judgment, whether the Legislature were sitting or not, the Governor could legislate by Ordinance, which would be valid for six months, and, if laid before the British Parliament, for a further six months. In similar but less urgent circumstances, he could pass a Governor's Act, after transmitting to the Legislature the reasons for and the provisions of the Act. Finally, if circumstances made it impossible to work the Constitution, the Governor could proclaim that all or any of his functions would be exercised in his discretion, and assume the powers of any organ of government other than the High Court.

If the Legislative Assembly refused or reduced a demand for a grant made in the Budget, the Governor could, if he anticipated that this would affect the due discharge of his special responsibilities, certify a sum not exceeding the original demand, which would then be deemed to have been voted.

The Act broadened the franchise; qualifications to vote at elections of the Legislative Assembly varied between the different Provinces, being based on payment of taxes, occupation of property, the attainment of certain standards of education, or previous service in the armed forces. Women, if literate, or married to qualified males, could vote. There were general constituencies, special communal constituencies for Muslims, Sikhs, Anglo-Indians, Europeans, Indian Christians and special constituencies representing commerce, landholders, universities, labour and women. The number of members varied between two hundred and fifty in Bengal to fifty in the North-West Frontier Province.

To entitle a person to vote at elections to the Provincial Legislative Council, it was necessary either that he should have held high public office, or possess a property qualification somewhat lower than that required in the case of a voter at elections for the Council of State. In Bengal and Bihar a high proportion of the members was chosen by the Legislative Assembly, and, in all Provinces with a

second chamber, roughly one-seventh were chosen by the Governor. The principle of communal representation was extended to the upper chambers, and minorities were given weightage. The number of members varied between sixty-four in Bengal to twenty-one in Assam.

The Centre

Though the provisions of the Act dealing with the Centre were not brought into force, and though the structure of the Central Executive and Legislature under the 1919 Act was retained, the relations between the Centre and the Provinces were much the same as they would have been if the Federation had been established. The radical change from the position under the 1919 Act was that legislative power, and power to administer laws made in the exercise of that legislative power over certain subjects was transferred to the Governors' Provinces. Under the 1919 Act, power to legislate on certain matters was only delegated to the Provinces; the Centre still retained power to legislate on any subject. Under the 1935 Act, subject to exceptions, within its own legislative and administrative sphere, the Provinces were subject to no interference from the Centre.

The Central Executive remained responsible, not to the Central Legislature, but to the Secretary of State, and the Central Legislature lost power to legislate on the subjects which had been transferred to the Provincial legislative sphere.

It has been observed that certain Bills could not be introduced into a Provincial Legislature without previous sanction; similar restrictions applied to Bills in the Central Legislature, and also to Bills imposing enhanced income tax on the ground that the persons or companies affected were non-resident in India.

All Legislatures were prohibited from passing Acts discriminating against British subjects domiciled in the United Kingdom in the pursuit of legitimate callings in India, and against companies incorporated in the United Kingdom who were trading in India. Many of these restrictions were resented as preventing the nursing of infant indigenous industries by shielding them from outside competition. Though the Act provided that many of these restrictions should lapse if the British Parliament discriminated against Indian companies, an Indian industrialist could fairly retort that he had no intention of establishing steel works in Sheffield or cotton mills in Lancashire.

Another provision of the Act which also aroused resentment was the creation of a Federal Railway Authority. The intention was to remove the railways from the political arena, so that they

could be run, subject to strategic requirements, on sound economic lines, but this was regarded as an unnecessary derogation from the powers of the Central Legislature, intended to place the railways under an authority subject to the control of the Secretary of State, and the influence of British capitalists.

Since 1935, the number of statutory authorities with wide discretionary powers to deal with industries and other activities, all created for the purpose of directing the activities with which they are concerned on sound economic lines, and ensuring good management, has remarkably increased.

The outbreak of war in 1939, and the subsequent attitude of Congress, resulted in the comparative failure of even the provincial part of the Act. The emergency made necessary amendments which tightened the control of the Centre over the Provinces. The Governor-General's power to legislate by Ordinance, which had been preserved in the Act of 1935, ordinarily would only have extended to subjects within the legislative power of the Centre, but the Act provided that, on the promulgation of a Proclamation of Emergency (which was justified by the outbreak of war) the power to legislate by Ordinance extended to provincial subjects. An amending Act of 1940 enlarged indefinitely the period of validity of such Ordinances, which had previously been six months only.

It would, however, be wrong to conclude that, while the 1935 Act remained in force, there was no political development at the Centre. The Governor-General's Executive Council was progressively enlarged so that by 1943 it consisted of four British and eleven Indian Members. The latter were in charge of the defence, civil defence, education, posts, air and labour departments, and an Indian Member without portfolio represented India in the British War Cabinet. An Act of 1946 abolished a provision surviving from the 1919 Act that four Members of the Council must have special qualifications. Though the Indian Members were selected for their outstanding ability and experience, they could not have claimed to have the support of the majority of the elected members of the Legislature. They were responsible to the Governor-General, but, as some of them publicly testified, this did not mean that they were denied liberty to pursue policies they regarded as desirable.

Division of Powers between the Centre and the Provinces

Probably the most important survival from the 1935 Act is the distribution of legislative powers between the Centre and the Provinces. This distribution of powers is the main distinguishing feature of a federal constitution. Whatever method of definition is adopted, it is important that there should be as little doubt as possible as to

the boundary separating the central sphere from the sphere of the units of the Federation.

In any particular federation, the relative size of the two spheres, and the method of definition, depend on its previous history, and the political situation at the time when the constitution is framed. In the United States of America, from which all subsequent federations have derived inspiration, the matters in the power of the Centre are few, and specified; the remainder, unspecified, belong to the units. At the time when the American Constitution was framed, it was no easy matter to induce the states to federate, so the demands made on them to renounce part of their sovereignty had to be as few as possible. The Canadian Constitution was framed when memories of the possibility of the disruption of the United States by the American Civil War were still fresh, and when Canada was conscious of having no defensible frontier separating her from her powerful neighbour to the South. Consequently, not only was the Centre given a power of veto over Provincial legislation, but the units were given narrow, defined powers, and the residue was allotted to the Centre. But "for greater certainty" certain subjects were specifically allotted to the Centre, with the result that the courts, in determining whether a particular matter fell within the Central or Provincial spheres, felt obliged to weigh the lists the one against the other, and work out rules to be applied when an Act fell prima facie within items on both lists. In Australia, the absence of any grave external danger at the time when the Constitution was framed conduced to the American precedent being followed. The central subjects are enumerated, but the rule of interpretation is that the Central Legislature's authority is not to be regarded as exclusive over any enumerated subject unless, from the nature of the power, or the obvious result of its operation, there exists a repugnancy pointing to the conclusion that the grant was intended to be exclusive to the Centre; otherwise the units and the Centre have concurrent powers. An attempt was, therefore, made in the 1935 Act to achieve greater certainty by enumerating separately the central powers, the units' powers, and the concurrent powers.

The lists defining the legislative powers of the Centre and the Provinces under the 1935 Act owe their form and their content in part to an attempt to compromise between the conflicting views of Hindus, who wished to follow the Canadian precedent, and of Muslims, who advocated the maximum possible power for the units, in order to secure control in the Provinces in which they would be in a majority. The three lists were framed with the intention of covering, as far as possible, every known subject of legislation, one

list containing the subjects over which the Centre had exclusive competence, the second those over which the Provinces had exclusive competence, and the third subjects over which legislative power was concurrent.

On the Central list were those subjects, such as the armed forces and external affairs, on which the existence of the federation depended. The other subjects concerned India as a whole, or were believed to demand uniform treatment throughout India; they included currency, posts and telegraphs, census, emigration and immigration, major ports, maritime shipping, aircraft, copyright, bills of exchange, arms and explosives, and, subject to exceptions, companies, banking and insurance.

The subjects on the Provincial list did not necessarily demand uniform treatment throughout India; they were subjects in which Provincial interest was strong enough to ensure that they would receive adequate attention, subjects which had already been successfully delegated to Provinces. They included law and order, local government, public health, communications of only provincial importance, water supplies, agriculture, land, forests, fisheries within territorial waters, and internal trade.

The subjects on the Concurrent list in the main resembled those on the Provincial list rather than those on the Central list; they were mostly of Provincial rather than of all-India importance, but while it was desirable that the Provinces should have power to legislate on them, they could not be exclusively allocated to the Provinces, because it was necessary that the Centre should either ensure uniformity in the main principles, or set an example to the Provinces, or prevent action within a Province having repercussions outside. Thus the Centre enacted the more important civil and criminal codes, which could be supplemented by Provincial legislation not inconsistent with them; Labour welfare legislation might never have been undertaken without a lead from the Centre; epidemic diseases recognise no frontiers, so the Centre should be able to legislate for their control. The attempt to meet the Muslim demand is evident from the inclusion of Personal Law in this list. We find, therefore, on the Concurrent list, criminal and private law, arbitration, insolvency, professions, printing, lunacy, mechanical vehicles, factories, labour, trade unions, prevention of the spread of contagious diseases beyond a Province, and electricity.

The Governor-General, in his discretion, could allot subjects not mentioned on the lists.

In a federation it is necessary to have some means of settling disputes arising out of the division of powers between the Centre

and the units. The 1935 Act, following the American precedent, set up a Federal Court, which had original jurisdiction in disputes between two or more Provinces, and between the Centre and a Province; it had appellate jurisdiction from the High Courts only in matters involving questions of interpretation of the Act. On questions of interpretation, a further appeal to the Judicial Committee of the Privy Council was permitted.

Financial arrangements between the Centre and the Provinces

In allocating revenues between the Centre and the Provinces, it was realised that a few Provinces must be regarded as permanently deficit areas, and that earlier allocations had given the Centre an undue share of those heads which produced enhanced revenues when economic conditions improved. Under the new scheme, revenue from subjects on the Provincial and Concurrent lists were allotted to the Provinces, as well as the net receipts from terminal taxes, death duties and stamps, which were on the Central list. Out of the proceeds of duties on salt, excise (except on intoxicants and narcotics, which were on the Provincial list) and export duties, the Central Legislature could, but did not, make contributions to the Provinces; sixty-two and a half per cent. of the export duty on jute was allotted by Order-in-Council to the jute-producing Provinces. The Provinces were to receive a proportion of the income tax, fixed by Order-in-Council, at fifty per cent.

The Princely States

The Princely States in 1935 numbered over six hundred, varying in size from States like Hyderabad and Kashmir, each of which was comparable in area to Bengal, to estates of a few acres, in all stages of development, some patriarchal, some feudal, and some developing representative institutions.

The relationship between the Crown and the Princes was described as "Paramountcy." The States had no international status; *vis-à-vis* foreign powers, their inhabitants were British subjects; India, not British India, became a founder member of the League of Nations. Foreign affairs, admiralty and maritime rights were under the control of the paramount power. State land over which railways ran was ceded. Telegraphs and trunk telephones were by agreement under the control of the Central Government, and while a few States had their own internal postal service, the British Indian Postal Service was under Central control. Few States were entitled to strike their own coinage; some States paid tribute. The larger States maintained special bodies of troops, trained to work with the Indian army, which were inspected by officers of the Central Government. In some

States troops under the control of the Central Government were stationed in cantonments, which had been ceded.

Though generally subject to the restrictions indicated, the internal affairs of an Indian State were the Prince's responsibility; for each State there was a member of the Indian Political Department, as Resident or Agent, whose duties were to "advise" the ruler, and report to the Viceroy. By 1942 in the greater part of Princely India the judicial system, and the law enforced in the courts, showed no great superficial difference from that which obtained in British India, and it was claimed that progress had been made in education and public health. Taxation was low compared with British India, and assessed on different bases. Most land-locked States imposed import and export duties.

In 1926, in a letter to H.E.H. the Nizam, the Viceroy, Lord Reading, emphasised that no Prince could claim to negotiate with the Paramount Power on an equal footing; it was the duty of the British Government to preserve peace and good order throughout India. Both external and internal security rested ultimately on the power of the British Government, which would take appropriate action when Imperial interests were concerned, or the general welfare of the subjects of a State was seriously affected by the action of its Government. Disputes between two States or between a State and the Paramount Power were subject to the arbitrament of the Paramount Power.

Although no succession in a Princely State was valid until recognised by the Paramount Power, from 1917 succession by a natural heir was recognised as a matter of course, but adoptions required the approval of the Paramount Power, which also decided disputed successions. If the ruler was a minor, his education and the regency were under the control of the Paramount Power. The Paramount Power would intervene, by deposing the Prince, curtailing his authority, or placing him under supervision in the event of gross misrule, if the Prince had been guilty of disloyalty or involved in serious crime, or if he had failed to suppress cruel practices such as *sati*.[11]

While British Indian politicians, though often recognising the patriotism of the Princes, were inclined to regard the States as strongholds of medievalism, many States' rulers disliked the Central Government's interpretation of "Paramountcy"; they claimed the right to negotiate with the Crown, the recognition of their rights under their treaties, and they resented much of the "advice" tendered them by the Political Department.

[11] Self-immolation by a Hindu widow on her husband's funeral pyre (now obsolete).

Though previously opportunities for the exchange of ideas between them had been few, a desire for a change had become sufficiently manifest for the Montague-Chelmsford Report to recommend the establishment of a Chamber of Princes, which was set up in 1921. The Viceroy was President, and the members, who consisted of one hundred and eight ruling Princes and twelve others chosen by one hundred and twenty-seven smaller States, elected a Chancellor, a Pro-Chancellor, and a Standing Committee. The functions of the Council were to advise the Viceroy on matters affecting the States generally, and on Imperial affairs. The rights of individual rulers and the internal affairs of the States were outside its province. It was purely a deliberative body; its sessions, and attendance at them, were irregular; some of the larger States treated it with disdain. Even among those who attended, the larger States disapproved of the attitude of the smaller States, into whose hands such power as the Chamber possessed had fallen.

In 1926, however, the Chamber authorised the Standing Committee to prepare for the impending constitutional changes. The Indian States Committee, set up at the Princes' request to inquire into and report on the relations between the States and the Crown, issued a report in 1929, which the Princes found unsatisfactory. It recommended that the Viceroy, not the Governor-General in Council, should in future deal with the States, that the relationship between the Paramount Power and the Princes should not, without their consent, be transferred to a new Central Government responsible to the Legislature, but it reiterated the opinion that the Princes' rights, as set out in their treaties, had been modified by the practice of the Political Department and changed conditions. This, H.H. the Maharajah of Patiala remarked, left them with such rights as the Crown's agents thought fit to allow them.

The framing of the new Constitution presented the British Government with one outstanding difficulty. A considerable constitutional advance was inevitable, but it was reluctant to grant responsible government at the Centre unless the Central Legislature included a more stable element than that likely to be provided by the elected members for British India. In the hope, by supplying this, of obliging the British Government, and, by throwing in their lot with them, of securing the support of the politicians of British India, the Princes, at the first session of the Round Table Conference, accepted the principle of an All-India Federation. This would entitle them to be heard on all-India questions; the Constitution would provide safeguards for their interests, and even a minimisation of the concept of "Paramountcy" was not beyond the bounds of

possibility. On the last point the Princes were doomed to disappointment, and this seems the main reason why the Princes ultimately did not join the Federation during the British period.

The position of a federating State, under the Act of 1935, would have been different from that of a Government's Province in British India. The latter had executive and legislative powers defined by the Act. The entry of a Princely State into the Federation would have been effected by the acceptance by the Crown of an Instrument of Accession, executed by the Ruler, specifying the matters over which sovereignty was surrendered. No such instrument would have been accepted if it did not surrender power over a substantial number of subjects, though these might differ between different States. Whereas the representatives of British India in the Central Legislature were to be elected, those of the States would have been the nominees of the ruler, a difference which might not have been favourable to co-operation in the Legislature. Fiscal and economic differences between the States and the Provinces might also have been a source of friction. In the small States, with limited financial resources, the difficulty of providing an administration comparable to that obtaining in British India was insurmountable except by the application of the principles of the India (Attachment of States) Act, 1944, passed by the British Parliament, which applied only to the smaller States in Western India, and provided for their attachment, but at their instance, to other States or Provinces. Though this Act aroused the apprehensions of the Chamber of Princes, it foreshadowed what was to come.

The 1935 Act, adopting a suggestion in the Indian States Commission's Report, created the office of Crown Representative to exercise the functions of the Crown in matters, sovereignty over which had not been surrendered to the Federation. During the remainder of the British period, the functions of Governor-General and Crown Representative were performed by the same individual.

When the Indian Independence Act became law, some rulers asserted their independence, notwithstanding the advice of the then Governor-General, Lord Mountbatten, to accede to one or other of the new Dominions. The Constituent Assembly, in its capacity as Central Legislature, approved an Instrument of Accession requiring, as a minimum, surrender of sovereignty over Defence, Foreign Affairs, and Communications, and some rulers acceded. Junagadh, though surrounded by Indian territory, acceded to Pakistan, but the people revolted. After this, unless the fragmentation of India was to be encouraged, a strong policy towards the States by the Indian Government was inevitable. During the year

1948, under provisions added to the 1935 Act, by powers conferred by the Indian Independence Act, rapid progress was made in the attachment of States to Provinces, and the amalgamation of States into Unions. Some States surrendered all sovereignty, and were administered by the Centre according to the system prevailing in Chief Commissioners' Provinces. The process continued during the period preceding the inauguration of the Republic, and ultimately the States which were not amalgamated with Provinces, either separately or in union with other States, acquired under the Constitution a status similar to a Governor's Province as Part B States; or, in some cases, similar to a Chief Commissioner's Province as Part C States.

Chief Commissioner's Provinces and other territories

Under the 1935 Act, certain parts of India, described as Chief Commissioners' Provinces, remained under Central control, in the charge of a Chief Commissioner, appointed by the Governor-General. Of these Provinces, Delhi, Ajmere-Merwara, Coorg, the Andaman and Nicobar Islands, and Panth-Piploda remain parts of India.

Coorg, formerly a Princely State, had sided with the British in the war with Mysore in the eighteenth century. When it was annexed on account of the misgovernment of its ruler in 1834, instead of being amalgamated with Madras, as administrative convenience suggested, it retained its separate identity in deference to local sentiment. The Resident in Mysore became its Chief Commissioner. In 1919 it received a small, mainly elected Legislature; it had its own budget.

Ajmere-Merwara and Panth-Piploda were separately administered because they were surrounded by Princely States. Delhi was carved out of the Punjab in 1912 to provide India with a new capital free from provincial influence. Coorg, Delhi and Ajmere had each a representative in the Central Legislature, and the Acts of that body were applicable to them. Delhi, Ajmere and Panth-Piploda had no Legislature.

The Andaman and Nicobar Islands were a penal settlement. It was intended in 1921 to turn them into a colony, but the idea was abandoned. They were not represented in the Central Legislature, and the Governor-General exercised the legislative power in them.

Within the Provinces were certain backward tracts which, from the time when the British first assumed responsibility for them, had always had a simpler form of administration than that prevailing in the rest of the Province in which each was situated, and which were governed by special laws; enactments of the Central and Provincial legislatures might be applied to them, if necessary with modifications suitable to their more primitive conditions. Under powers given by the 1919 Act, they were divided into wholly excluded areas

and partially excluded areas. The Central and Provincial Acts did not apply in the wholly excluded areas, but the Governor-General could extend Provincial Acts to these areas with any necessary modifications. Expenditure in the wholly excluded areas was not subject to the vote of the Provincial Legislature. In the partially excluded areas, the power to apply Provincial Acts lay with the Governor of the Province. They were represented in the Provincial Legislatures, and Ministers administered transferred subjects within them. Provincial Legislatures could vote expenditure in, and discuss questions affecting, partially excluded areas. Under the 1935 Act, the Provincial Governor was empowered to extend Central and Provincial Acts, with necessary modifications, to all backward tracts, and, with the consent of the Governor-General, to legislate for them by Regulation. The administration of the wholly excluded areas was within the discretionary power of the Governor. Though partially excluded areas became a ministerial responsibility, the Governor had a special responsibility for their peace and good government.

Indian Independence

The Indian Independence Act of 1947 created two Dominions out of British India. Though, until the inauguration of the Republic, India remained a Dominion, her status was distinguishable from that of the Dominions to which the Statute of Westminster applies. The Statute of Westminster recites that a situation has been reached in which no law made by the Parliament of the United Kingdom shall extend to any Dominion, except at its own request and with its consent, and goes on to enact that a Dominion Parliament may repeal or amend any existing or future Act of the United Kingdom Parliament, but it does not, in terms, empower a Dominion Parliament to repeal the Statute of Westminster.

The Indian Independence Act made it impossible to extend an Act of the United Kingdom Parliament to India even at the request of, and with the consent of, India: if such a result were deemed desirable, it could only be achieved by an Indian Statute. The Indian Legislature received power to repeal and amend any Act of the United Kingdom Parliament, including the Indian Independence Act.

The title "Emperor of India" was relinquished, but allegiance to the Crown was temporarily retained. Until the new Constitution came into operation, India was to be governed by the 1935 Act, with modifications. The King was to appoint the Governor-General, but, apart from the Act, it was agreed that he would accept the recommendation of the leaders of the main Indian political parties. The safeguards and the provisions in the 1935 Act, requiring the Governor-General to act in his discretion or individual judgment,

were swept away, together with the power to reserve Bills for the consideration of the Crown; the Governor-General was given full power to assent, in the King's name, to any Act.

The powers of the Indian Legislatures were limited only by the surviving provisions of the 1935 Act. His Majesty's Government renounced all further responsibility for the government of India. The *office of Secretary of State was abolished. The powers of the Federal* Legislature were to be exercised by the Indian Constituent Assembly; this had been sitting since November 1946; it had been elected by the recently elected members of the Provincial Legislatures, and was more representative of Indian opinion than the Central Indian Legislature, which had been elected under the provisions of the 1919 Act. The Central Legislative Assembly had been elected in 1934, and the Council of State in 1937, the life of each chamber having been repeatedly extended owing to the situation created by the war. The main task of the Constituent Assembly was to create the new Constitution, but it had, in addition, general power of legislation on Central subjects, and power to amend the 1935 Act. The 1935 Act could also be amended by the order of the Governor-General to give effect to the Indian Independence Act. Existing laws not inconsistent with the Indian Independence Act continued.

Paramountcy, and suzerainty over Princely States lapsed; all treaties and agreements with Princes and Chiefs were abrogated, except those affecting customs and communications, which were to continue until denounced by the Ruler or superseded by fresh agreements with the new Government of India.

Under the powers to amend the 1935 Act, the Governor-General was deprived of his power to legislate, except by Ordinance, valid for six months only, in emergencies. To assist the policy towards the *Princely States, the definitions of "Indian State" and "Ruler"* were struck out of the Act, thus enabling the Indian Government to recognise any portion of Indian territory as a Princely State. Accession was to be by the Governor-General's acceptance of an Instrument of Accession to be laid before the Constituent Assembly.

The "Departments" of the Central Government were converted into "Ministries." In the Provinces similar changes to those made at the Centre followed, and the Governor was deprived of the power to suspend the Provincial Constitution.

CHAPTER 3

THE DEVELOPMENT OF THE ADMINISTRATIVE SYSTEM

Administration before the British Period

The primary unit of administration in rural India is the village; the principal unit is the district. Though, all over India, the village, notwithstanding famine, pestilence, rebellion and foreign conquest, has survived as the primary political unit from time immemorial, in Bengal, when the East India Company first assumed the reins of government, the *zamindari* had, to a large extent, superseded the village. The district, controlled by a Collector or Deputy-Commissioner, developed from the exercise of the powers given by the *Diwani* grant, and became an essential feature of the administrative system. The transition from despotic to representative government has necessarily involved a modification of the power and influence of the head of the district. In most parts of rural India he is still essential to the working of the governmental machine; he is the State's man of all work, the local Pooh Bah. Whether and for how long this will continue is now doubtful.

At least until 1833 the main functions of government were to repel invasion, suppress rebellion, punish crime, enforce contracts and raise the revenue necessary for these purposes.

During the greater part of the British period, the most important source of revenue was land revenue. Most public officials of Muslim and Hindu governments, which preceded the British Administration, were either military officers, who, if only in dealing with crimes against the State, administered some measure of criminal justice, or revenue officers, who, in the course of their duties to collect revenue, were obliged to mete out some measure of civil and criminal justice. The Ruler and his ministers exercised all governmental powers, but the right of access to them was limited. With the establishment of Muslim rule, there were established *Kazi's* [1] courts, where the *Sharia* [2] was administered. Provided distance did not make access impossible, these were possibly adequate to the needs of the Muslim population; they administered both civil and criminal justice. A Hindu, however, would be at a disadvantage, for a *Kazi's* court could not apply the Hindu personal law, and a Hindu would not be a competent witness. The country generally, outside the more important towns, apart from

[1] Indian variation of *Qadi*, a Muslim judge.
[2] The law of Islam.

visits of the soldiery and the tax collector, was left to manage its own affairs.

In Bengal the *zamindar* ruled his *zamindari*, but in the greater part of India the village was ruled by its headman, or possibly by a committee of elders called a *panchayat*.[1] There was also a village watchman, who was either a villager or a member of a criminal tribe selected on the principle "set a thief to catch a thief," and a village accountant, who kept the records of rights in land. Most of the affairs of the village were managed either by the headman or the *panchayat*, but sometimes decisions would be taken by the whole body of assembled villagers, not on a majority vote, but by discussion until general agreement was reached.

Another institution controlling the lives of Hindus was the caste, for the head of the caste, or the caste *panchayat*, or the assembled members of the caste in a particular locality, could impose penalties for offences against the rules of the caste, and such offences were not exclusively breaches of religious observances.

There was little beyond the power of public opinion to enforce the decisions of caste or village authorities, but so long as the power of the State was weak, this was sufficient. When the British set up a new type of official, with the power of a modern State behind him, the decay in the influence of the caste and village authorities was inevitable. In the village this tendency was accentuated by British policy, which caused village officials to appear as minor agents of government rather than representatives of the local people.

In Bengal the *zamindars* were attached to specific tracts of land; in origin some were rulers, others tax gatherers. Whether they were owners of their lands or merely entitled to a rentcharge was disputed, possibly from a desire to have a single rule to cover diversity of facts. They were obliged to collect and pay land revenue, and ancillary to this duty they had, of necessity, power to administer civil justice, and they either assumed or were suffered to administer criminal justice also, for whosoever was responsible for collecting the revenue was obliged to exercise such other functions of government as would ensure that the revenue was available and was collected.

The development of the administrative system was, therefore, conditioned by the instruments used and the method employed in collecting land revenue. Land revenue had to be assessed and *settled*. *Assessment is the calculation of the amount payable in* respect of a particular tract of land; settlement is the determination of the person or particular body of persons who is to pay it. It was

[1] *A committee of five.*

axiomatic in India that whoever first cleared waste land was at least entitled to occupy it, and that the King was entitled to a share in the produce of all land. According to the *Sastras*[4] the King's share was one-sixth of the gross produce, subject to increase in emergencies, but emergencies were so frequent that it was generally one-half. In Muslim times it varied between one-third and one-half.

The Emperor Akbar[5] established a scientific method of assessment. Land was divided into classes according to quality; rates were based on average outturn over ten years; each holding was either measured or the measurement checked each season, and the settlement was made with each peasant. Reductions were permitted for crop failures, and on land brought back into cultivation. Later Emperors, however, farmed out the revenue to contractors, who generally collected oppressively as much as they could, and paid into the Imperial Treasury as little as they dared.

Development in Bengal

The *Diwani* grant of 1765 empowered the Company to collect the revenue in Bengal, Bihar and Orissa, but obliged it to pay large sums to the Emperor and to the Nawab of Bengal. Having no experience of such a task, and insufficient British employees to undertake it, the Company continued in office the two *Naib-Diwans* who controlled the collections, and endeavoured to secure efficient and faithful service by paying them large salaries. It soon appeared, however, that the *kanungos*, who kept the records of rights, in collusion with the *zamindars*, were keeping the Company in ignorance of the real taxable capacity of the country, and the proper apportionment of the revenue demand.

In 1772, Warren Hastings, then Governor in Bengal, dismissed the *Naib-Diwans*, and posted Company's servants to the charge of fiscal districts as Collectors. An attempt was made to ascertain the taxable capacity of the country by making five-year settlements in certain areas, which were farmed out by public auction. The assessments were too high, and the farmers often speculators, so that the only beneficial result of the experiment was that the Collectors observed and reported on the grievances of the cultivators. Next year, however, on the insistence of the Directors, the Collectors were replaced by six Provincial Councils. After a fact-finding commission had toured Bengal, Hastings in 1781 abolished the Councils and restored the Collectors to their districts. A Supervisory Board of Revenue was set up in Calcutta, and in 1783 the Board ordered all Collectors to tour their districts and make estimates of crop prospects.

[4] The Hindu Law Books.
[5] 1556–1605.

The Collectors became the judges of the civil courts which Warren Hastings established, and judges of the revenue courts which dealt with disputes between *zamindar* and occupant. Though criminal justice remained in the hands of Muslim officials, the Collector exercised some control over the criminal courts. He quickly developed into the local agent of the Company; through him the Company obtained intelligence of what was happening in rural areas; he was the obvious instrument for execution of the Company's decisions; he generally showed active sympathy towards the oppressed; he could, if necessary, call to his aid the Company's military forces.

Lord Cornwallis[6] disapproved of an arrangement concentrating in one individual executive, revenue, and judicial powers, and in 1793 the Collector ceased to be a judge of the civil and revenue courts, being confined to the exercise of fiscal powers only. For a time the judge-magistrate, who dispensed civil and criminal justice, became the head of the district.

Lord Cornwallis accepted the view that the *zamindars* were landlords, and imposed on Bengal the Permanent Settlement, whereby the revenue due from them was fixed in perpetuity. As the Company was still without adequate information about the taxable capacity of the country, and improvements were immune from taxation, this meant a loss of future revenue. The steps taken to protect occupants' rights were inadequate. As Collectors had thereafter only to receive the revenue and take proceedings against defaulters, they lost touch with the people, and their districts became too large to be manageable when successive new functions were added to the Collector's task. The Indian intermediaries between him and the people were the unpopular police, and, in his district, even they were under the control of the judge-magistrate. The original districts were aggregates of *zamindaris*, and the Collector dealt with the *zamindar*, but the land tended to pass out of the hands of the old, big *zamindars* into new hands, so that the obvious method of subdividing the district was to make it an aggregate of police circles.

Upon this arrangement, Lord William Bentinck[7] in 1829 superimposed a new supervisory authority. Districts were grouped into divisions, each under a Commissioner. The Commissioner was to become an executive and revenue officer exercising supervisory and appellate functions, but at first he also controlled the police and held criminal assizes. It soon transpired that he was overworked; in 1831 his assize work was transferred to the district judge, and the judge's

[6] Governor-General, 1786–1793.
[7] Governor-General, 1828–1835.

magisterial powers were transferred to the Collector. Expanding trade and agriculture had increased the volume of government business, so the districts were apportioned into subdivisions, each in charge of a joint-magistrate or deputy-magistrate.

Development in Madras

The imposition of the Bengal system upon Madras, when, in different conditions, the administrative system was in an early stage of development, meant a greater similarity between the two systems than natural development in Madras would have created.

The rulers who preceded the Company had employed as tax-collectors *amildars*, who usually dealt with the village authorities, except in the remoter areas, which were under the control of semi-independent predatory chiefs. The Madras Government set up a Board of Revenue in 1786, which sent out Collectors, who found it possible to make settlements for short periods, with each ryot or cultivator, through his village headman. This system became known as the *ryotwari* system, in contradistinction to the *zamindari* system of Bengal. The early Collectors in Madras experimented in surveying, so that they and their subordinates came into intimate contact with the lives of the people.

In 1798, however, Lord Wellesley[a] ordered the introduction of the Bengal system; the Collector was superseded by the judge-magistrate, and *zamindari* settlement commenced. In dealing with the semi-independent chiefs, *zamindari* settlement met with some success, but it proved disastrous when villages were grouped together artificially to make a new *zamindari*. Fortunately opinion was beginning to swing against *zamindari* settlement, and it was abandoned when about one-fourth of the Province had been so settled. *Ryotwari* settlement became the rule, the Collector returned, assuming magisterial and police powers, but he had also, what the Bengal Collector had not, the duty of making periodical settlements. The districts were divided into *taluks*, each in the charge of an assistant revenue officer, a *tahsildar*, who later was given magisterial powers. Ultimately *taluks* were grouped into sub-divisions, but Madras never found it necessary to appoint Commissioners.

Development in Bombay

The Island of Bombay had been British territory since 1668, but there was not, until the nineteenth century, sufficient accession of territory to bring the Company's representatives there to grips with the same problem as had faced their colleagues in Calcutta and

[a] Governor-General, 1798–1805.

Madras. The Bengal system, with variations, was introduced in 1818; there was no Board of Revenue; the *ryotwari* method of settlement was followed; districts were smaller than in Bengal; the Collector's assistant, the *mamlatdar*, not only supervised collections of revenue, but was responsible for police arrangements, and he received requests for civil and criminal justice to be done, sending the former to *panchayats*, and the latter to the Collector.

Developments in Other Parts of India

In Northern India, some accessions of territory were administered in the same manner as Bengal, but the *zamindari* system was not introduced into any new territory after 1807. New territories which were not incorporated into Bengal, instead of being subject to the Governor-General's Regulations, which was the name given to the legislation of his Council before 1833, were governed by simpler rules and ordinances issued by the Governor-General, giving wide discretion to local officials, and such territories were therefore described as "non-regulation provinces." In the regulation provinces, there were provisions in Acts of the British Parliament considerably restricting the selection of persons for appointment to public office, but in the non-regulation provinces a wider discretion in the choice of officials was permitted. The outstanding non-regulation province was the Punjab, where, shortly after its annexation, the administrative system of the non-regulation provinces was worked out. It provided for the appointment of a proportion of military officers to civil posts, for the maintenance of public order was usually the most urgent matter in a non-regulation province. The province was divided into districts, but all powers and functions—revenue, executive and judicial—were united in the head of the district, styled the deputy-commissioner. The deputy-commissioner was, in all matters, subject to the appellate and supervisory authority of the Commissioner. Later, as the non-regulation provinces were pacified, the administrative system was progressively assimilated to that in the older provinces.

Settlement

Fair and equitable assessment of land revenue is as essential to the welfare of the Indian peasant as an efficient and economical system of settlement and collection is to the financial stability of a State. It was by taking an active part in settlement operations that the executive official learnt to know the Indian peasant and his circumstances; successful participation in settlement operations rightly paved the way to high administrative office in India. It is therefore necessary to consider briefly how a modern settlement is effected.

Once *ryotwari* settlements had become the rule, a general policy could be worked out. Its main points are that there must be a cadastral survey of cultivated land *; records of rights and interests in land must be kept up to date, occupancy rights must be protected, assessment must be made after inquiry, and must be moderate. Every district is settled for a period of thirty or forty years. Before the arrival of the settlement party, maps of groups of holdings are made, and the records of rights in the land are drawn up under the control of the head of the district. The settlement officer, after examining the nature of the soil, the kinds of cultivation, and the tenures of occupants, fixes principles on which soil classification is to be made, and the settlement party proceeds to classify the soil in accordance with the principles laid down. The next task is to estimate the average price of the output per acre of each class of soil, making allowance for the occupant's expenses and other factors. The actual assessment will not normally exceed 40 per cent of the net cost of cultivation.

Simultaneously with these experiments and calculations, inquiries into and verification of the records of rights proceed, and, when all is finished, a comprehensive settlement report is prepared, and presented to the State Legislature for consideration and amendment before it becomes the basis of assessments until the next settlement. It is then the responsibility of the head of the district to keep up to date the record of rights, and to collect the revenue. The revenue actually payable in any year will vary in accordance with the market price of the staple crop.

The Police Forces

The early arrangements for police work in Bengal and Madras have already been referred to. In Bombay, under the supervision of the *mamlatdar*, it proved possible to have much police work done by village officials, but to supply escorts and treasury guards and to deal with public disturbances, it was necessary to recruit semi-military bodies, which were under the control of the Collector. The first step towards the creation of the present police forces was taken in Sindh in 1848, shortly after its annexation. This new force, modelled upon the Royal Irish Constabulary, with a comparatively high standard of discipline, and with officers performing no judicial, revenue or other executive functions, proved so successful that in

* This involves the preparation of maps of cultivated land. The scale of these maps, and the area shown on a map are selected with a view to convenience in calculating the revenue demand according to the acreage held by each person liable to pay. The maps are prepared by triangulation. The work is done by subordinate revenue officers under supervision. Fresh surveys are made periodically, but a map once made is printed and lasts for several years.

1861 a civil police force on the same lines was enrolled in each Province. At the head of each provincial force, subject only to the control of the Provincial Government, was an Inspector-General, assisted by deputies. Within each district a superintendent of police responsible for its working, discipline, and management is at the head of the force, but he is otherwise subordinate to the deputy-commissioner or Collector.

Other Public Services

Within the district, as public services became specialised, the district head of each service came to occupy a position with respect to the Collector or district magistrate similar to that of the district superintendent of police. In the early days of the British period, public works were done by public-spirited individuals, or local landlords, or were carried out by the Collector and his revenue assistants. Larger projects were undertaken by the Military Engineering Department. In 1858 the Public Works Department was established, with a chief engineer in each Province responsible to the Provincial Government, and an executive engineer in each district subordinate to the chief engineer, but generally the deputy-commissioner had the last word in matters affecting the rights of the public and the general administration of the district.

When the importance of forest preservation was realised, it became necessary to secure the services of German experts, and to arrange for the training of English forest officers in France. Preserving the forest wealth of India, so that controlled rights of extraction could be leased, and reafforestation done, meant the creation of forest reserves, in which existing rights had to be defined or extinguished with compensation, and a forest law had to be created and enforced. The divisional forest officer, subordinate only to the provincial chief conservator in professional matters, was subject to the control of the deputy-commissioner in matters affecting the rights of the public.

The civil surgeon, the professional head of the district health service, and also usually the superintendent of the district gaol, was similarly professionally responsible to the Provincial Inspector-General of Civil Hospitals and the Inspector-General of Prisons, but, outside his professional sphere, responsible to the Collector. The excise superintendent and other specialists in each district occupy an analogous position.

As the sphere of governmental activity was enlarged by the Legislatures, it became inevitable that, unless specialist officers were appointed, the Collector and his revenue assistants were the only instruments whereby the policy of government could be implemented.

For instance, labour welfare and elections cast new burdens upon their shoulders.

District Administration

British India was sufficiently long under the control of a strong Central Government for a considerable degree of uniformity in administrative practice to be achieved. The Collector or deputy-commissioner is the head of the district, and local representative of the State and the Union Governments. The district is divided into sub-divisions under sub-divisional officers, and each sub-division is usually further divided into administrative units called *taluks* or *tahsils*, each under a salaried official, a *mamlatdar* or *tahsildar*, who, like the sub-divisional officer, is a revenue and administrative officer and magistrate. At district headquarters is a treasury into which receipts are paid, and from which money for government expenditure is drawn, either directly or through the agency of a branch of the State Bank of India, in the charge of a treasury officer, who is immediately responsible to the deputy-commissioner. There are sub-treasuries at the headquarters of the sub-divisions, and sometimes of the smaller administrative units, in direct charge of the administrative heads of the units. At district headquarters are the district heads of the specialist services, such as the superintendent of police, the divisional forest officer, the executive engineer, the superintendent of land records, the civil surgeon, and the superintendent of excise. The deputy-commissioner is the eyes and ears of government, and its adviser on new projects. He is the guardian of public safety. He must anticipate trouble, and prevent it if he can; if he cannot, he must quell it or alleviate it. He may delegate the execution of acts necessary in the performance of these duties, but he cannot delegate the responsibility. Except in Madras, there is a Commissioner for each group of districts, called a division, who supervises, and hears appeals in revenue and administrative matters. The final court of appeal in revenue matters is the Board of Revenue or the Financial Commissioner.

It is perhaps necessary to emphasise the difference between the English and the Indian systems of administration. Though the Parliament of the United Kingdom is legally omnicompetent, up to the beginning of the nineteenth century England had but few stipendiary administrative officials. Whereas the Indian Legislatures have usually imposed the duty of implementing legislation upon the deputy-commissioner, until well into the nineteenth century the United Kingdom Parliament usually imposed that duty on the justices of the peace, who received no remuneration, and who were local dignitaries rather than local representatives of government. The

justice of the peace had his own private affairs to attend to, and Parliament could only impose on him such duties as he had leisure and ability to perform. When Parliament found it necessary to prescribe conditions for works in factories, it became clear that the tasks involved could not be performed by the justices. The factory inspectors were the vanguard of the growing army of British officials which now carry out the orders of government, but English officials are organised departmentally. There is, in England, no representative of government corresponding to the Indian deputy-commissioner, who co-ordinates the activities of different specialist officials at so low a level.

Another point which it is perhaps necessary to stress is the personal accessibility of the deputy-commissioner and subordinate executive officers to the general public. In England the normal method of approach to a government department is by correspondence, and an individual who fails to get satisfaction usually writes to his M.P. Though Indians have developed the habit of approaching their representatives in the Legislatures, they may decide to approach the executive official, who has to allot much of his time, both at his headquarters and when on tour, to listening to complaints from aggrieved persons, and taking action or giving advice regarding them. Not only does this mean that government is kept informed of what is going on, but in many cases it means that the aggrieved person can get something done more quickly than by approaching his member of the Legislature, who sometimes can do no more than pass the complaint on to the deputy-commissioner.

The position in urban and industrial India is, however, different. In a town the municipality performs many of the functions performed in rural India by executive officials, and the personal relationship between the citizen and the official disappears. New legislation creates new authorities and boards, and calls for the recruitment of new cohorts of specialist officials and inspectors, so that the situation tends to develop in the direction which Britain has taken. Urbanisation and industrialisation have not, however, proceeded to a degree comparable with that achieved in the West. The country is not yet completely overshadowed by the town, nor agriculture by industry.

The Secretariats

Government, whether Union or State, operates through its Secretariat. Each is divided into Ministries, among whom the various subjects of governmental activity are distributed according to administrative convenience. The Minister will have a Deputy-Minister or Parliamentary Secretary to assist him in his duties in the Legislature. Each Ministry will have a permanent official secretary

and an under-secretary, possibly a joint-secretary and assistant-secretaries. Communications conveying information to or requiring the orders of government, on reaching the Secretariat, are registered and placed on a file with previous correspondence and all other relevant material. A précis of the communication is made, applicable rules and precedents indicated, and the file is put before the under-secretary, who passes it on to the secretary with his opinion or suggested course of action. In accordance with the rules of the department, the secretary either passes orders or refers it, with his remarks, to the Minister. The Minister either passes orders or refers it to a meeting of the Council of Ministers for orders. Joint-secretaries exercise delegated functions of the secretary, and assistant-secretaries of the under-secretary.

Central Services

So far, the account of the Administration has been confined to rural India, and it is still incomplete. There are various activities of the Union Government with which the deputy-commissioner has little direct contact. The Railways, the Posts and Telegraphs, the Income Tax Department, the Scientific Departments, the Customs, the Mint, and other departments either operate on a scale which makes it impossible to have a departmental unit or representative in each district, or else deal normally with matters outside the scope of the deputy-commissioner's control. These services operate on departmental lines, subordinate officers being responsible to senior officers of their departments.

Personnel of the Services

A word may be said about the development of the method of recruitment to the Indian Public Services. The earliest appointments were made from the Company's junior and senior merchants, factors, and writers, and the Charter Act of 1793 required that all positions in the Company's civil service, with a salary of more than £500 per annum, should be filled by its covenanted servants.[14] As training in the new duties was necessary, Lord Wellesley founded a college in Calcutta in 1800, but six years later Haileybury was established in England as a training college for the Company's covenanted servants, who were nominated either by the Directors or the Board of Control. From 1853 appointments were made as a result of open competition in England, and two years later Haileybury was closed. It had never been, in practice, possible to comply with the provisions of the Charter Act of 1793, and the Indian Civil Service Act of 1861 gave

[14] This term was applied to regular officials, who had entered into a covenant of service with the East India Company, or, after 1858, with the Secretary of State.

ex post facto recognition to appointments which had been made contrary to that Act; it also contained a schedule of posts to which persons who were not members of the Covenanted Service could be appointed, subject to confirmation by the Secretary of State.

The Charter Act of 1833 had specifically provided that neither race nor religion should disable anyone from holding public office, but the maximum age limit of candidates for the Covenanted Service was progressively reduced; it was twenty-one in 1866; the effect was to make it difficult for Indian candidates to succeed at the examinations, and it was not until 1869 that three Indians succeeded. The Government of India Act of the following year made it possible to appoint Indians who were not in the Covenanted Service to the Scheduled Posts, but these appointments were to be subject to rules, which were not put into effect until 1879. These rules provided for the appointment of "statutory civil servants," not exceeding one-sixth of the number of appointments to the Indian Civil Service in each year. Sixty-nine Indians were nominated under these rules, but the experiment was not a success, and it was abandoned in 1886.

There was an uncovenanted service, manned by military officers, and other Britons and Anglo-Indians recruited in India, but these were debarred by the Act of 1870 from the scheduled posts, and by the Act of 1861 from posts in the Secretariat; in practice they could not hope to reach high judicial office. At first they found congenial occupation in non-regulation provinces, but as these became more settled, and the administration tended to approximate to that in the older Provinces, they found their services in less demand.

The Act of 1793 did not place restrictions on appointments to the lower-paid posts, so that Provincial Governments were able to recruit Indians to uncovenanted service, usually by nomination, though sometimes by competitive examination, and a successful candidate was usually required to undergo a period of probation.

The superior officers of the police, from inspector-general to assistant-superintendent, were recruited from the Army until 1892, after which they were recruited by examination in England and by nomination or examination in India.

The Public Works Department recruited its officials up to 1870 from the Royal Engineers, by examination in England, and from Indian Engineering Colleges. In 1871 the Engineering College was established at Cooper's Hill, where English candidates were trained, while the Indian Colleges at Roorkie, Poona and Madras were reserved for Indian candidates. From 1885 recruits to the Forest Services attended courses at Cooper's Hill, and paid visits to France for practical training. Cooper's Hill was closed in 1906. Subsequent

recruitment to the superior posts in these services were made mainly by selection in England.

The Indian Medical Service was primarily a military service, but its officers, until the Act of 1919 came into force, filled the higher Civil medical posts.

The officials of the Prisons, Posts, Telegraphs, Surveys, Salt, Excise, Opium, Scientific, Customs, Mint and Agricultural Services were recruited in India, but the senior posts were filled by officers recruited in England. The Finance Department was manned by similar methods, but deficiencies had to be filled by recruitment in England.

One of the earliest tasks which Congress set itself was to secure better representation of, and methods of entry more favourable to, Indians in the Public Services. A Public Service Commission in 1886 rejected the Congress demand for simultaneous examination in India and England for the Covenanted Service, but, as a result of its recommendations, the Covenanted Service became the Indian Civil Service. Each Province was to have a Provincial Civil Service, the members of which would be eligible for appointment to certain listed posts, *amounting to one-sixth of the scheduled posts. Each Province* would also have a Subordinate Civil Service, and the division of the other Services into Imperial (the members being appointed by the Secretary of State), Provincial, and Subordinate (whose members were appointed by Provincial Governments) followed.

The agitation for Indianisation of the services continued, and after the publication of the Montague-Chelmsford Report, provision was made for recruitment to all services in India; recruitment for one-third of the superior posts was to be made in India, and the proportion of Indians was to be progressively increased. Following the report of the Lee Commission in 1924, one-fifth of the vacancies in the Indian Civil Service was filled by promotion from the Provincial Services, and one-half of the remaining vacancies were filled by Indians; other rules provided for the Indianisation of other Imperial Services. In consequence of the devolution of certain matters to Provincial Governments by the Act of 1919, the recruitment to Imperial Services concerned with some of the transferred subjects ceased after 1924; in particular the Imperial Educational, Agricultural, Veterinary and Engineering (Roads and Buildings) Services were closed, and new Provincial Services were created.

Thus, at the end of the British period, there were in the Provinces, in addition to members of the Provincial and Subordinate Services, officers of the All-India Services appointed by the Secretary of State, officers of the Indian Civil Service, the Indian Police Service, the

Indian Forest Service, and the Indian Service of Engineers (Irrigation). The Secretary of State also appointed the officers of the Central Services Class I, who occupied the superior posts in the Railways, Posts and Telegraphs, Customs and the Imperial Secretariat.

The 1935 Act provided for the establishment of Public Services Commissions for the Centre and the Provinces, the members to be appointed by the Governor-General or the Governor. Their functions were to conduct examinations for candidates to the public services, to frame schemes for recruitment, to advise on principles of posting and transfer of officers, and to advise on disciplinary action against, and claims made by, officials.

Tenure and Service Conditions of Public Servants

Until the Act of 1919 was passed, every member of a Covenanted or Uncovenanted Service, of every Imperial, Provincial or Subordinate Service, held office at the pleasure of the Crown. The conditions of service of members of Covenanted or Imperial Services were prescribed by rules made by the Secretary of State, of members of Provincial and Subordinate Services by rules made by Provincial Governments, and of members of Central Services by rules of the Government of India, but they had no rights which could be enforced in a court. The Act of 1919 gave statutory recognition to these rules, but provided for their revocation or variation by the Secretary of State. In that these rules could not be the basis of an action by an aggrieved government servant in court, they stood on a different footing from the express provision in the Act that no government servant could be dismissed by an authority subordinate to that which had appointed him, which cut down the right to dismiss at pleasure. The 1935 Act went further, cutting down this right by providing that no such person should be dismissed or reduced in rank unless, subject to exceptions, he had been given a reasonable opportunity of showing cause against the action proposed to be taken against him.

This provision the Federal Court and the Judicial Committee agreed was mandatory, but they disagreed as to the rights of the government servant who had been dismissed without the opportunity of showing cause being given to him. The Federal Court held that he was entitled to recover his pay by suit,[11] but the Judicial Committee held that a government servant had, in the absence of an express contract, no right to recover arrears of pay; his pay was bounty from the Crown.[12] The decision of the Judicial Committee

[11] *Punjab v. Pandit Tarachand* [1947] F.C.R. 89.
[12] *High Commissioner v. I. M. Lall* [1948] F.C.R. 44.

was based in part on a decision of the Court of Common Pleas[24] that no action lay against the East India Company to recover arrears of pension recoverable by an officer in its military service, but this decision turned partly on the rule of English law, inapplicable in India, that no action lies against a corporation on a contract unless it is under seal, and it was held that, so far from there being any analogy to any recognised exception to the rule against recovery on a contract by a corporation not under seal, the Company's officer was in a position analogous to that of a King's officer receiving a pension at the bounty of the Crown; he had no right to recover it by suit. The Federal Court considered the question whether an Indian government servant's pay was bounty, and rejected it on the ground that his pay can be attached by his creditor in India; the creditor could have no higher rights than the government servant himself.

Before the 1935 Act was passed, a government servant enjoyed some protection against civil and criminal proceedings, "in respect of acts done or purported to be done in the execution of his duty as such public servant," a phrase which has not been easy to interpret in practice. The Code of Criminal Procedure forbade the institution of criminal proceedings without government sanction against a public servant not removable without the sanction of a Provincial Government or higher authority for an act done or purported to be done in the discharge of official duty, and the Civil Procedure Code protected public servants from suits arising out of similar acts until two months had elapsed after notice in writing had been given. The 1935 Act forbade legislation to alter these provisions without the previous sanction of the Governor-General or the Governor. The same Act provided a similar protection in respect of acts done before the Provincial part of the Act came into force by Provincial officers, and before the Federal part of the Act in respect of Central Officers; it went further and provided that any such proceedings, if validly instituted, should be dismissed unless the act complained of was not done in good faith.

The Services under the Constitution

Under the Constitution Parliament may legislate regarding the recruitment and conditions of service of persons employed in connection with the affairs of the Union, and State Legislatures may enact similar laws in relation to persons employed in connection with the affairs of a State but, until such legislation is enacted, the President or his delegate may make rules covering these matters in connection with the affairs of the Union, and a Governor may do the

[24] *Gibson v. East India Co.* (1839) 5 Bing. N.C. 262.

same in connection with the affairs of the State.[14] Up to the present the Legislatures have not exercised this enabling power and the services are governed by Conduct Rules. If the Council of States, by a *resolution supported by two-thirds of its members present and* voting declares it expedient, Parliament may create all-India services, common to the Union and the States, regulate their recruitment and conditions of service. The Indian Administrative Service and the Indian Police Service, in existence at the commencement of the *Constitution, are deemed to have been created in exercise of* this power.[15] The All-India Services (Amendment) Act, 1963, has added the Indian Service of Engineers, the Indian Forest Service and the Indian Medical and Health Service. Parliament has enacted the All-India Services Act, 1951, which empowers the Union, after consultation with the States, to make rules regarding recruitment and conditions of service of the services mentioned, which must be laid before Parliament and are *subject to amendment by it; rules have* been made in exercise of this power and have the force of law[16]; this raises the question whether a rule repugnant to a Fundamental Right is valid. Despite decisions to the contrary, it is submitted that the better opinion is that as nobody has a Fundamental Right to be a public servant,[17] and as a public servant obviously cannot enjoy all the rights of a private citizen, an abridgment of his Fundamental Rights by the Conduct Rules is valid if it is reasonably necessary to enable him satisfactorily to perform his public functions.[18] The policy of the law is to keep public servants aloof from politics but not to disfranchise them; there is no objection to a public servant proposing a candidate for election to a Legislature, unless this is part of a plan to procure the candidate's election otherwise than by voting for him.[19]

Members of the defence services, of every Union civil service and of all All-India services, hold office at the pleasure of the President; so do all persons holding posts connected with defence or any civil post under the Union; every member of a State civil service and every person holding a civil post under the State holds office at the pleasure of the Governor. A member of a service is subject to the service conduct rules, which are, in effect, terms of his service contract; a person holding a temporary civil post (who may be a specialist, required to perform a duty beyond the capacity of the ordinary member of a service) may, at the discretion of the President

[14] Art. 309.
[15] Art. 312.
[16] *Lachman* v. *Superintendent*, A.I.R. 1958 All. 345.
[17] *P. Balakotaiah* v. *Union*, A.I.R. 1958 S.C. 232.
[18] *C. N. Chelapan* v. *State of T.C.*, A.I.R. 1957 Ker. 43.
[19] *Raj Krushna* v. *Binod*, A.I.R. 1954 S.C. 202.

A sub-inspector of police, appointed by the pector-General of Police, was dismissed by a deputy-inspector; his was held to be void,[22] but it is not necessary that the appointing authority should hold the inquiry or order it to be held.[24] No such public servant may be dismissed or removed or reduced in rank without being given a reasonable opportunity of showing cause against the action proposed unless the ground is conduct resulting in a criminal conviction or where the authority empowered to punish records in writing that it is not reasonably practicable to permit him to show cause (on which point his decision is final) or when the President or Governor is satisfied that it is inexpedient in the interest of the security of the State.[25] This protection is not available to members of the armed forces; the Army Act, 1950, the Navy Act, 1957, and the Air Force Act, 1950, deal with the discharge, dismissal and reduction in rank of such persons. The protection is not available to the persons holding "civil posts connected with defence" mentioned in Article 310; being paid from defence estimates, they are in the same position as military personnel in the strict sense.[26] Though the finance and functions of such statutory corporations as the Damodar Valley Corporation and the State Bank of India are controlled by government, their employees do not occupy civil posts within the meaning of Article 311. Government departments carry out such commercial enterprises as railways, public works and posts and telegraphs, and there are government companies incorporated under the Companies Act, 1956. It is not possible to lay down a general formula to cover all employees of all such undertakings; whether a particular person employed by such an undertaking comes within the protection of Article 311 depends on the facts of each case.[27]

[20] Art. 310.
[21] *State of Bihar* v. *Abdul Majid*, A.I.R. 1954 S.C. 245.
[22] Art. 311 (1).
[23] *State of Bihar* v. *Abdul Majid* (*supra*)
[24] *Jyotinath* v. *State of Assam*, A.I R. 1955 Assam 171.
[25] Art. 311 (2) (3).
[26] *Atindranath* v. *Gillot* (1955) 59 C.W.N. 835.
[27] *M. Verghese* v. *Union*, A.I.R. 1963 Cal 421.

The right to show cause at a departmental inquiry does not arise if services are terminated at the end of the period contemplated by a public servant's service contract[28] nor when a punishment other than those mentioned above is inflicted. It only arises when there has been termination of services or reduction in rank for misconduct, incapacity or lack of will, *i.e.*, on some ground involving an imputation which the public servant might have been able to disprove or explain.[29]

The right involves not only that, when the inquiry is held, the rules of natural justice must be observed and the public servant given a reasonable opportunity to make his defence but also that, after it has been decided that the charge has been proved, he is entitled to show cause against the punishment proposed.[30] If the services of a public servant have been terminated in contravention of the constitutional provisions set out above, he is entitled to a declaration that the order of dismissal is void and to a decree for arrears of pay accrued since it was passed.[31]

The Constitution provides for a Public Service Commission for the Union and for each State but, if the legislatures of two or more States pass resolutions in support, Parliament may establish for those States a Joint State Public Service Commission and the Union Commission may act for a State at the request of the Governor with the President's permission.[32] The members of the Union Commission and a Joint Commission are appointed by the President, those of a State Commission by the Governor; as nearly as may be half must have held government appointments for ten or more years. They hold office for six years or, on the Union Commission until they reach sixty-five, on any other Commission sixty.[33] A commissioner may be removed for misbehaviour by the President on a report after inquiry by the Supreme Court.[34]

[28] *Satish Chandra* v. *Union*, A.I.R. 1953 S.C. 250.
[29] *Shyamlal* v. *U.P.*, A.I.R. 1954 S.C. 369.
[30] *High Commissioner* v. *I. M. Lal* [1948] F.C.R. 44.
[31] *State of Bihar* v. *Abdul Majid*, A.I.R. 1954 S.C. 245.
[32] Art. 315.
[33] Art. 316.
[34] Art. 317.

CHAPTER 4

THE DEVELOPMENT OF LOCAL SELF-GOVERNMENT

The Village

The story of local government in India during and after the British period is not a happy one. The Presidency Towns, Bombay, Calcutta and Madras, assumed importance as the main trading stations of the East India Company and became cities which, in the eyes of their merchant inhabitants, called for a kind of local government with which they were familiar in their native country before the exercise of political authority over other Indian territory was contemplated. When the *Diwani* grant changed the situation, the Company at first still regarded itself as mainly a trading corporation. When the concept of empire developed, until the middle of the nineteenth century it was assumed that the proper function of the Government of India was to act as an umpire permitting different classes of subjects to pursue their own destinies, and only interfering when this involved one class unduly harassing another. In the latter half of the nineteenth century responsibility for the well-being of India was increasingly recognised, attention being given to public works, irrigation, communications, public health and agriculture, specialist officials being recruited to deal with these matters.

The internal boundaries of India drawn by the Mughals for convenience in collecting revenue and maintaining law and order were generally retained by the British. The Mughals were by inclination town-dwellers and devoted attention to local government in towns but paid little attention to the villages. Even today the majority of Indians live in villages. At the beginning of this century a village would consist of the headman, the accountant, the watchman, the priest, the schoolmaster, the grain merchant, the blacksmith, the potter, the washerman, the general body of cultivators and the village servants, Harijans, who performed many tasks, including conservancy, which other villagers could not perform without losing caste. The headman, with the assistance of the accountant and the watchman, managed the day-to-day administration of the village. Anything of importance would be decided by a village meeting, not by majority vote, but by discussion until general agreement was reached. The *ryotwari* system of land revenue settlement had, however, converted the headman from spokesman for the village

against the Mughal officials into a minor cog in the British governmental machine. The *panchayat*, a committee of five or six village dignitaries, which, before the British period had dealt with many aspects of village administration, not without regard to general village opinion, found its functions assumed by the police and the courts established by the British. In the twilight of the Mughal Empire the village system collapsed in many parts, as tax farmers and *zamindars*, free from effective imperial control, set themselves up as local tyrants. In particular in Bengal, when the Company decided on direct rule, it was obliged to treat the *zamindari* as the administrative unit, and the permanent settlement made with the *zamindars* by Lord Cornwallis encouraged this development. The *zamindari*, however, did not prove a durable unit; in 1816 local rural committees were formed to deal with communications.

The village could deal successfully with many of its problems. It accepted poor relief as an obvious duty; it could provide primary education. In time of famine its organisation could be harnessed to the government machine but generally it failed when co-operation was called for with authorities outside the village other than the local revenue authorities; nothing survived from the pre-British period linking the village with any other authority. Generally a villager could see no advantage in any scheme of public utility not designed exclusively for the benefit of his own village. Before the middle of the nineteenth century no public services were supplied to rural India. Communications, health services, improved educational facilities and agricultural advice could not be supplied or directed by the existing revenue officials for lack of time or by village officials for lack of understanding. The officials who supervised the construction of roads and railways, who established the postal services, the inspectors of schools and the agricultural experts were strangers to the villagers. They were in the higher ranks of the government hierarchy and there was no indigenous institution with which they could be associated. It was paternal despotism and only the size of the public debt accruing from the wars in the Punjab, Afghanistan and Burma and the mutiny directed the attention of Government to an examination of the question whether the villagers could not learn to do for themselves things they could probably do better than technical officials. This would involve a consideration of the question of local taxation. Though Indians generally are philanthropic and acts of public charity are common, the majority of villagers are very poor and, whether poor or not, reluctant to pay taxes to finance rural self-government.

From 1861 it was clear to a discerning eye that India was moving

in the direction of representative government, even if this was not declared until 1917, but as the history of Canada and other countries shows, experience in local government leads to the demand for autonomy and the ability to work it.

Though previously attempts to resuscitate the village system had not met with any marked success, the Royal Commission on Decentralisation in 1909 opined that the foundation of any system associating the people with the administration must be the village; an informally elected *panchayat*, with the headman as chairman, should be gradually introduced with petty judicial powers and responsibility for minor public works, schools and sanitation. Instead of being given taxing powers, they would be financed by grants. They would be supervised by the Collector and protected from minor officials. An attempt to implement this in part was made in 1912 but generally abandoned in 1916 as a failure. In 1919 the Bengal Village Self Government Act was passed; this set up union boards, a union covering about ten square miles; two-thirds of the members were elected and the members elected their chairman. The main duties of the board were to maintain schools, roads and pounds and provide elementary public health services. Selected members could be formed into benches with petty judicial powers. The circle officer exercised supervision. The U.P. Panchayat Act, 1950, set up *panchayats* which could be elected or nominated, mainly to exercise judicial powers. The Bombay Village Panchayats Act, 1920, created minor municipal boards, with members mostly elected, who elected their chairman. Though a *panchayat* was liable to suspension for misconduct, it was not under the control of the Collector.

Presidency Towns Municipalities

Local government in the three presidency towns was originally vested in the Governor's Council. In 1688 a corporation was set up in Madras by royal charter, modelled on that of Portsmouth. There were to be three English, three Portuguese and seven Indian aldermen, elected by the burgesses; the mayor was elected by the aldermen. The hope that this would overcome reluctance to pay taxes was disappointed. In 1726 a new charter set up corporations in Bombay and Calcutta and reconstituted the Madras corporation. Each corporation consisted of nine aldermen, of which seven were British; the mayor was selected by the Governor from two nominees of the aldermen. As is indicated elsewhere,[1] the corporations exercised judicial functions, and civic functions were not well performed. The Charter Act of 1793 empowered the Governor-General

[1] pp. 203, 204.

to appoint justices of the peace to provide for conservancy, road repairs and police out of a tax on land and houses. Except in Bombay, there was no obvious improvement. In 1845 in Bombay civic duties were transferred to a Conservancy Board, consisting of seven members; of these, three Indians and two Britons were elected by the justices from among themselves. A similar system was introduced in Calcutta in 1847, four of the seven commissioners being elected by ratepayers; in 1858 civic administration in each of the three towns was vested in a body corporate consisting of three salaried commissioners. Though in Bombay two of these were elected by the justices, the others were chosen by the Governors.

The City of Bombay Municipal Act, 1888, not only created the machinery for municipal government in Bombay but set the pattern for urban boards in India. Its main features are the concentration of powers in a stipendiary official with considerable freedom of action but *subject to the control of an elected corporation*. This Act, with numerous amendments, is still in force. All the executive powers of the corporation are vested in the commissioner, who is subject to such controls as are mentioned in the Act and must explain and defend his actions in answers to questions put by councillors at meetings of the corporation. He is appointed by the State Government for a three-year term and is elegible for re-appointment. He may be removed by government for misconduct, incapacity or neglect or by a resolution of the corporation supported by five-eighths of the members. The corporation consists of 124 councillors elected every four years from wards. The mayor, who presides at its meetings, is chosen by the councillors from among their number and holds office for a year. There is a standing committee of sixteen, selected by and from among the councillors, half of whom, chosen by lot, retire at the end of each year; this committee meets at least once a week. The Act itself provides for an education committee, an electric supply and transport committee and an improvements committee, the last having assumed some of the work formerly done by the board of trustees established by the repealed City of Bombay Improvement Act, 1898. The corporation has powers to appoint advisory committees and to delegate powers to special committees.

The budget and by-laws are drafted by the commissioner, considered by the standing committee and placed before the corporation for approval. The standing committee also scrutinises the weekly accounts.

The obligatory functions of the corporation cover conservancy, public health, hospitals, water supply, markets, slaughterhouses, protection against fire, removal of dangerous structures and obstructions,

roads, bridges, buildings, public lighting, cleaning of streets, primary schools, improvements and registration of births and deaths. Its *discretionary functions include further education, libraries, museums*, parks, public transport, supply of electricity and registration of marriages. In case of default, the State Government may carry out any statutory duty and charge the cost to the corporation. Revenue is raised by a property tax, a tax on vehicles and animals, town duties and an education tax.

An Act for Madras was passed in 1884; this was amended in 1904 so as to vest many of the corporation's functions in a managing committee, similar to the standing committee in Bombay. An Act of *1919* brought the situation in Madras still closer to that in Bombay.

In Calcutta an Act was passed in 1888 with the characteristic feature of a strong executive, subject to government control. Nevertheless, power fell into the hands of a few professional politicians who, as members of a number of committees, interfered to such an extent with the day-to-day administration that the public health of the city became a matter of grave concern. An Act of 1899 reduced the elected element, enhanced the powers of the official chairman and vested most of the corporation's powers in a managing committee with a majority of nominated members. This was replaced in 1923 by an Act, sponsored by the first Bengal Minister for local government, which vests power in the council, which may delegate to the chief executive officer and standing committees. Government control is strictly limited, the mayor and chief executive officer being elected by the council. The franchise was extended and women given votes. The Act also provided for the creation of district committees, consisting of the members for and resident in the district, with powers to co-opt.

Municipal government

In the Mughal period each town was controlled by an autocrat exercising civic and police functions called the *Kotwal*. Early in the days of Company rule his powers passed to the Collector and superintendent of police. In northern India, without authority of law, it became the practice to associate local dignitaries with the Collector to form a customary municipality for the purpose of raising revenue, which was spent on police and sanitation. An Act of 1842, applicable to Bengal only, provided for the establishment of town committees at the request of the householders but little use was made of it. An Act of 1850, of general application, provided for the creation of municipalities at the request of the inhabitants with powers to provide lights, repair roads, maintain a conservancy system,

frame by-laws enforceable by fine and levy indirect taxes. In Bombay, at least, some advantage was taken of this statute. In the 1860s a surprising enthusiasm for municipal government, in which officials played little part, developed and in that decade and the next Municipal Acts for most provinces were passed but in the municipalities they set up there was little evidence of the elective principle: the police absorbed a large portion of the revenue and official influence was paramount. Even after general recognition of responsibility for the welfare of India, the notion that government in India must, for the sake of efficiency, be paternal persisted.

But in 1882 Lord Ripon [3] sponsored a resolution of his Council to be interpreted in each Province according to local conditions. Political education must be the primary function of local government, to which efficiency must give way. Two-thirds of all boards should be non-officials, elected where possible; elections were to commence at once in the more progressive towns. The chairman should be a non-official, where possible.

Government officials generally were opposed to the curtailment of official control but the effects of this opposition were less obvious in the towns than in the countryside. On urban and rural boards the specified non-official element was provided, but there were some wholly nominated boards and the percentage of elected members varied considerably between provinces. Until 1909 government policy paid little attention to the educational aspect of local government and concentrated on attempts at efficiency. This involved increased control by officials, including departmental experts and the accounts department, and engendered dissatisfaction among non-official members of boards, whose attention was diverted from public service to party politics and exhibitions of resentment against official interference.

The Decentralisation Commission had recommended that official control should be limited to enforcing neglected services and suspending boards which habitually neglected their duties; the chairman should be an elected non-official and each board should have a majority of elected members. Larger boards should have a chief executive officer, a medical officer of health and a chief engineer. The boards should be relieved of responsibility for police and some other matters and given wider fiscal powers with full control over their budgets. Delay in implementing these recommendations was inevitable but there was a slight increase in the number of unofficial chairmen, the municipal franchise was liberalised and the Commission's recommendations regarding public health officials were substantially implemented. But the exigencies of the Kaiser's war

[3] Governor-General, 1880-1884.

curtailed development and the professional politician took advantage of the growing consciousness of power in the urban mob to divert its energies to direct action and non-co-operation. The boards defied the law, municipal servants defied the chief executive officer and the public broke the by-laws and refused to pay taxes. Members with experience of local government were either defeated at the polls or withdrew. The new members obtained appointments for municipal officials on grounds of caste and Muslims in particular felt aggrieved at being pushed into the wilderness. The Montagu-Chelmsford Report, 1918,[3] summed up the situation by saying that the presence of an official element on the boards had been prolonged to a point when it impeded initiative and responsibility but the political associations which had addressed the Commission did not adequately appreciate the importance of local government or the magnitude of the advance which its emancipation involved, though the point had been repeatedly made by prominent Indian leaders.[4] Though some changes in the direction indicated were taken before and after the Act of 1919 came into force, the main effect of dyarchy rule on local government was the spread of communal representation and a reluctance to prevent the boards learning by making mistakes.

Under the Government of India Act, 1919, local government was a transferred subject controlled by a Minister, who was invariably motivated by a desire to emancipate local government from official control. The boards were made more representative, given wider powers and more money. But the provincial elections of 1923 ended in a victory for the Swarajists, whose avowed policy was to make the Constitution unworkable, so that attention strayed from local government to party manoeuvres and the power to make grants to rural boards was exercised less to ensure efficiency than to favour a policy supported by the Ministers; officials generally gave the matter little attention. Local government became a field for communal disputes and national politics, so that the plans of the first dyarchy Ministers for the development of public services suffered. The comparative affluence of India after the Kaiser's war ended with the slump in 1930, so that grants for local government fell and local services were contracted. There was no real recovery from this in the remainder of the British period. National politics and the struggle for independence overshadowed local government. Though the Government of India Act, 1935, gave Provinces autonomy, local government stagnated; Hitler's war and the general suspension of ministerial government did nothing to assist progress.

[3] Montagu-Chelmsford Report, p. 103.
[4] *Ibid.* p. 137.

Rural Boards

Even after general recognition of the extension of the minimal functions of government, the notion that in India government was to be paternal persisted. Further, it was generally assumed that, if the new public welfare functions of government were to be efficiently fulfilled, especially in rural areas, they must be under strict governmental control. But in 1882 Lord Ripon's resolution expressly stated that his main object was not improvement in administration but political and popular education. This could not be achieved if the boards were overshadowed by the Collector. He envisaged sub-district boards, the district boards exercising supervisory and co-ordinating functions, but the provincial legislation to implement the resolution generally entrusted the purse and the power to the district boards, with powers of delegation. His immediate successors tinkered with the system with the object of improving efficiency, and it was not until the Royal Commission on Decentralisation presented its report that a new direction could be given to policy. The Commission attributed the inefficiency of the rural boards to inadequate funds and an insufficient share in administration. Sub-district boards should be the principal agencies of local government, receive half the district board's income and control minor roads, primary education and rural dispensaries. The Collector should continue as chairman of the district board, which would be financed by a cess not exceeding two annas in the rupee on land revenue and *bloc* grants. Though these recommendations were accepted by the Government of India, provincial governments found difficulty in implementing them: the reasons given were the paucity of funds, difficulties in raising revenue, indifference to public affairs, unwillingness of local dignitaries to submit to election and the unfitness of those willing to participate in local government. The situation created by the Kaiser's war brought progress to a standstill.

Local Government since Independence

Independence gave India new rulers with new targets; increasing industrialisation was a paramount objective, but the necessity of increased agricultural production and the development of village industries, together with social development, enhanced literacy, improved health services and care of the helpless and indigent were regarded as important. The districts were divided into blocks comprising an average of about 70,000 souls, and in 1952 the Collector became chairman of the district development committees, consisting of the technical officers from the blocks and some non-officials, empowered to plan and execute improvements in agriculture, animal husbandry, education, public health, social welfare,

co-operation and village industries. In 1954 the block development committees included chairmen of village *panchayats*, but it was officially admitted that popular participation, a striking feature of the elections to Parliament and the State Legislatures, was lacking in rural development, which was almost entirely officially inspired. State Ministers complained of a spate of petitions in relation to matters which should be dealt with at a lower level and would overwhelm them, unless the people generally participated more effectively in local government from the village upwards.

The Balwantrai Mehta Committee, having inquired into the problems, issued a report in 1957. Though there is a Community, *Panchayati Raj* and Co-operative Department of the Union, local government is a State matter, and the Department, apart from furnishing money for development, education of prospective officials and training of councillors, can only put pressure on States to sponsor such legislation as it regards as fundamental. The legislation so sponsored, though drafted on a consideration of the report, varies from State to State, but *panchayati raj* has been established in nine States and the necessary legislation has been passed in three others.[8]

Generally, the recommendations in the report seek to establish, in addition to the *panchayat* in each village, a *panchayati samati* in each block and a *zila parishad* in each district. In theory at least, there is in each village a *gram sabha*, composed of all adults, to whom the members of the *panchayat* give an account of their activities and whom they consult on the village budget and development plans. While the question of what powers are to be given by law to the *gram sabha* awaits an answer, the legislation usually provides for elections to the *panchayat* by adult suffrage. The members of the *panchayat* elect one of their number as president and he is their representative on the *panchayati samati*. The members of the *panchayati samati* elect their chairman, who represents them on the *zila parishad*. The Collector is the chairman in some States; in others he is a non-voting member or only acts in a supervisory capacity. Cohesion between the three tiers is aided by the facts that the *zila parishad* allots parts of its grants to the *panchayati samatis*, who in turn pass on part of their shares to the *panchayats*, and that the general administrator, usually the Collector, and all technical officials are responsible for the efficiency and industry of the officials of the *panchayati samatis*.

The staff available to a *panchayat* usually consists of a few workers and a part-time secretary. The *panchayati samiti* has a chief executive officer who is also secretary; he is responsible for

[8] A.P., Assam, Madras, Maharastra, Mysore, Orissa, Punjab, Rajasthan and U.P. have it. Legislation has been passed in Bihar, Gujerat, and Madhya Pradesh.

the implementation of the decisions of the *samati* and has usually one official in charge of each of the following: agriculture, animal husbandry, industries, public works, *panchayats*, co-operative movement and social education. The Collector is usually chief executive officer of the *zila parishad*. Teachers, village workers, clerks, accountants are on a *zila* cadre; extension officers, district technical officers and officials of the *samiti* and *parishad* are usually on State or All-India cadres.

There is a wide range of minor heads of taxation, of which little use is made, except in Madras; the excuses usually given are that the people are too poor and that no board which votes enhanced taxes is likely to be re-elected; the boards rely mainly on grants from the State and the Union.

Exercising hindsight, one might regret that Lord Ripon's policy of 1882 did not meet with a better reception. Probably the first boards established in accordance with his proposals would have been inefficient, but one may doubt whether they would have been very different from those in other countries. Had they been nursed by men with vision, prepared to take a risk, a tradition of service in local government might have been created and an outlet found for the energies of those who, forty years later, were engaged in civil disobedience; the way to independence might have been easier and the outcome less catastrophic; local government might by then have been set on a firm foundation on which the new rulers could safely build.

Panchayati raj faces many difficulties. Illiteracy, ignorance and sectional interests are still manifest and a tradition of continuous active public service is still to be created; to meet these, training centres have been established. The paternal or dictatorial attitude of officials, which Lord Ripon had observed, must give way to a more egalitarian and benevolent attitude; the former has not disappeared with British rule; to meet this government runs special courses. A defect in the scheme is that municipalities are excluded and there are municipalities in India in charge of as few as 5,000 souls. But it is the most important attempt yet made to deal with one of India's most difficult problems and its success is greatly to be desired. For it is difficult to see how dictatorship in local politics can be combined with representative government at the Centre and at the State level; local government should be the training ground for national statesmen.

Finance of Local Authorities

Providing adequate financial resources for local government boards is as difficult a problem as providing adequate revenue for

the States. Though, at the beginning of the British period, octroi was collected with comparative ease in Northern India, it was early abolished in Bengal, to circumvent the practice of the Company's servants, who pushed their private trade free of duty. When the impost amounted to no more than a handful from a basket of garden produce brought into a town for sale, it was less of an obstacle to internal trade than when commerce expanded, and it involved a system of bonded warehouses and refunds; it was eventually replaced by a terminal tax. It was, however, unknown in Madras and the Central Government advocated the substitution of direct taxation, but this was new, and therefore unpopular.

A board's powers of taxation are limited by the Act under which it is established, and in granting powers to a board the State Legislature is limited to such of the powers of taxation contained in the State List of Subjects as it can afford to pass on to the board. Just as the State expects a grant in aid from the Union, so does the board expect a grant from the Government of the State.

In the Presidency Towns, taxes are imposed on the rateable value of houses and lands, on goods brought into the town for use and consumption, and on vehicles and animals; Calcutta taxes professions and occupations, Madras taxes companies, and levies an additional stamp duty on conveyances and other documents.

Government Control of Local Authorities

A board is obliged to keep government informed of its activities, and to submit to government inspection of any work in progress. Generally the Commissioner is the supervising authority of a local government board. Any resolution, or order, or licence may be cancelled, and any act prohibited if it is illegal, or *ultra vires* of its powers, or dangerous to life or safety or the public peace. In an emergency the Collector may do any act within the competence of a board necessary for the public safety at its expense. If a board defaults in a statutory duty, government may order it to be done, or do it at the board's expense. Elected members may be removed for wilful refusal to do their duty, and the board may be dissolved or superseded for persistent default or abuse of powers. Unfortunately it has in the past been too often necessary to make use of these powers.

Delegated Powers of Legislation

All municipal and local government boards have delegated powers of legislation, in that they are empowered to make rules and by-laws, usually with the previous consent of government. In dealing with the validity of impugned by-laws, the courts have applied the

principles laid down by the courts in England. In making a rule or by-law, the authority must strictly comply with the provisions of the Act; if the previous sanction of government is required, it must be obtained, but, even if it has been obtained, that will not prevent the by-law being impugned on other grounds. A rule or by-law must not be repugnant to the general law, but it may supplement it. A by-law must be reasonable; it must be fair to the persons affected by it, and the court is the judge of what is reasonable. Under a *power to make rules prohibiting traffic on roads, if this appeared* necessary to prevent grave public inconvenience, a municipal board made a by-law prohibiting any coolie or servant using a certain road at any time. The by-law was held to be unreasonable and therefore *ultra vires* the board's powers.[6]

Legal Procedure Against Local Authorities

Most of the Acts creating municipalities and local boards provide protection from suits against such bodies and their employees. In most of these Acts civil proceedings may not be instituted against such a body, or against any of its servants in respect of an act done in the course of official duty until one month has elapsed since notice in writing is given, and the suit must be instituted within three or four months of the Act complained of. Many of the Acts also provide for tender of amends, or for payment into court, which, if adequate and if refused, will cause the plaintiff to be mulcted in costs.

[6] *Emp* v. *Bal Kishan* (1902) I L R. 24 All 439.

CHAPTER 5

THE NATURE OF THE CONSTITUTION: TERRITORY AND *CITIZENSHIP*

The General Nature and Character of the Constitution

Much of the language used in the Constitution has been borrowed from the Government of India Act, 1935, and it has been said that the basic differences between the two documents are in the preamble and the Fundamental Rights.[1] The Act of 1935 was, in legal theory, an Act of the King-Emperor in the United Kingdom Parliament, the Government of India being a government subordinate to the United Kingdom Government. The preamble to the Constitution states "We, the people of India, having solemnly resolved to constitute India into a sovereign democratic republic . . . in our Constituent Assembly . . . do hereby adopt, enact and give ourselves this Constitution." Although it might be argued that the Constitution was made by a body not fully representative of the people, a constitutional theory might be founded on the words of the preamble *that all political power derives from the people, that the Constitution* is a grant of powers by the people and that all powers of government must derive directly or indirectly from the Constitution. The Supreme Court has, however, been reluctant to enunciate such a theory, taking the view that resort can only be had to the preamble when the provisions of the Constitution are ambiguous.[2]

The Indian Constitution is said to be the longest in the world. The Founding Fathers wished to make specific provisions for defects and omissions in earlier constitutions and sometimes epitomised judicial decisions made under other constitutions, so that the provisions dealing with distribution of powers and the Fundamental Rights *are more detailed than in other constitutions.* Unlike other constitutions, the Indian Constitution deals in detail with the State constitutions. To ensure a successful start for democratic rule in India, it was thought necessary to deal exhaustively with such matters as the public services, elections, and qualifications and tenure of judges, which elsewhere might be regarded as more suitably dealt with in ordinary legislation. Special long provisions had to be made for backward areas demanding special treatment. It was even

[1] *Gopalan v. State of Madras*, A.I.R. (1950) S.C. 27.
[2] *Reference by the President of India under Art.* 143 (1), A.I.R. 1960 S.C. 845.

thought necessary to lay down objectives of administrative and legislative action in a chapter of Directive Principles.

The Constitution is rigid, in the sense that the greater part of it cannot, as in England, be amended by ordinary legislation. An Act of Parliament may redraw the internal frontiers of India,[3] abolish or create a second chamber in a State Legislature,[4] or amend the provisions for the administration of the Scheduled Areas and Tribes[5] but the provisions relating to the election of the President, the extent of the executive power of the Union and the States, the Supreme Court, the High Courts, the distribution of legislative powers, the representation of the States in Parliament and the amendment of the Constitution can only be amended if a Bill for that purpose is passed by a majority of the total membership and of two-thirds of those present and voting in both Houses of Parliament and when the amendment is ratified by the Legislatures of at least one-half of the States. The provisions of the Constitution not mentioned already can be amended by a Bill passed in Parliament by the special majority mentioned above and ratification by the State Legislatures is not necessary.[6] In the first eleven years of the Constitution there were twelve Acts specifically described as Constitution (Amendment) Acts and other Acts effecting far-reaching constitutional changes. This has only been possible because of the large Congress majority in Parliament.

The Constitution adopts, both at the Centre and in the States, the Commonwealth system of cabinet government and therefore does not strictly maintain the doctrine of separation of powers, *viz.*, that executive, legislative and judicial powers must be vested in separate persons or bodies of persons but it defines and limits the powers vested in the different organs of government established by it.

The Indian Constitution is federal in form. The greater part of India is a union of States, political power, in normal conditions, being divided between the Union and the States, so that the administration of the Central Government and the State Government, as well as the laws of Parliament and the State Legislature, operate directly on the people, each Government being limited to its own sphere and independent, within its own sphere, of the other.

It has been said[7] that successful federal government is only possible if the different communities in the Union desire to be united under a single Union Government for some purposes and organised under State Governments for other purposes. The desire for union

[3] Art. 4.
[4] Art. 169.
[5] Sched. 5, para. 7; Sched. 6, para. 21.
[6] Art. 368.
[7] K. C. Wheare, *Federal Government* (1951), p. 36.

should spring from the need for common defence and freedom from foreign interference, from the hope of economic advantage and from prior political association; all these factors were recognisable in India in 1947. Differences in religion, race and social institution do not necessarily prevent union, as Canada, Switzerland and the United States testify, but they may make union difficult or impracticable. India has, for centuries, successfully borne the burden of a babel of tongues and is still seeking a solution to this problem. The burden of social differences has also been borne for centuries but, since independence, by abolishing untouchability and taxation of the wealthy, a levelling process has gathered momentum. Moreover, social differences are only a menace to federalism when the social differences are between different units, as between the free and slave States before the American Civil War. In India other differences are more serious; the differences between Hindu and Muslim are greater than those between Catholic and Protestant, with which Canada and Switzerland have been able to contend. Religious differences have already resulted in the partition of the sub-continent and, since independence, India has had its difficulties with the Sikhs. But India has wisely chosen to be a secular State; there is no established religion or church and freedom of religion is a fundamental right.

The factors producing the desire to be separate for certain purposes are mainly geographical. As in the United States, Canada and Australia, in India the great distances isolating communities have created a regional consciousness. Climatic differences over wide areas create problems calling for different solutions in different parts. In North-Eastern India agricultural problems arise from excess of water; in North-West India they arise from shortage of water. Some political scientists maintain that a true federation only arises when the federating States have had a previous independent existence, involving the development of traditions they wish to maintain and the acquisition of economic interests they wish to preserve. But in Austria, Russia, Mexico, Brazil and Venezuela federations have been created by making the provinces of the previous unitary system the units of the federation, mainly because their different economic situations called for such an arrangement. The same considerations apply to India.

An essential pre-requisite of successful federal government is similarity of political institutions; this is made clear by the differences which arise from time to time in the United Nations Organisation between the countries that have parliamentary institutions and those which do not. Though some of the former Princely States had gone far along the road towards parliamentary government, in the majority

the distinctive feature was the personal rule of the Prince, whereas in the Provinces of British India progress towards democracy had gone further. When the Constitution came into force this difference might have been regarded as a handicap to successful federal government but in the past fourteen years nothing has occurred to suggest that this has been the case.

Capacity to work a federal constitution depends on the existence of sufficient financial resources and sufficient trained personnel. Federal government involves some overlapping of function and therefore more public servants than unitary government. Except possibly in relation to technical services, there seems no evidence to suggest that personnel are not available and the number and quality of India's technicians is improving. India is, however, short of money. The policy of increasing industrial activities, combined with a more effective system of taxation, is designed to improve this situation but time must elapse before the benefit can be felt and there is a tendency for able civil servants to suggest to their sons a career in business or industry.

Political scientists have argued the question whether the Indian Constitution is truly federal. It has been said that it is a unitary constitution with federal features.[4] But there seems to be no agreement about the essential criteria of federalism; whether a constitution is federal involves no moral judgment and to describe a constitution as quasi-federal gives little help to an understanding of its nature. It is submitted that the distinction between a unitary constitution and a federal constitution is sufficiently important to justify the preservation of the two categories and that if a constitution allots to the units political power over all matters which do not demand general national treatment, together with, as a matter of right, sufficient financial resources to give such matters the attention they need, it should be regarded as federal.

The Units

There is no theory of equality of status among States in India. In the Constitution, as originally enacted, there were four classes of units. The Part A States (so described as they were enumerated in Part A of the First Schedule to the Constitution) consisted of the former Governor's Provinces of British India, in some cases including former small Princely States integrated with them; this had been done to create the Part A States of Bihar, Bombay, Madhya Pradesh (Central Provinces), Madras, Orissa and Uttar Pradesh (United Provinces). Assam was the former provinces, less the greater part of the Sylhet

[4] K. C. Wheare, "India's New Constitution Analysed" (1950) 48 A.L.J. 21.

District, which became part of Pakistan. Punjab had parted with most of the territory west of the Sutlej but acquired some Princely States. West Bengal had also suffered partition but gained the territory of a small Princely State. The Part B States consisted mainly of *unions of former Princely States*, Madhya Bharat, Patiala and East Punjab States Union (Pepsu), Rajasthan, Saurashtra and Travancore-Cochin. Hyderabad remained as before, except that Berar was integrated with Madhya Pradesh. Jammu and Kashmir and Mysore remained as before. In the two categories of units already mentioned, the federal principle was in force but it did not apply in the two remaining categories, where the central power ultimately prevailed. The Part C States consisted of the former Chief Commissioner's provinces of Ajmere-Merwara (renamed Ajmer), Coorg and Delhi, the former Princely States of Bhopal, Bilaspur, Kutch, Manipur and Tripura and two *unions* of Princely States, Himachal Pradesh and Vindhya Pradesh. The Andaman and Nicobar Islands were the only unit in the last category, known as a territory. The Constitution provides that new States can be admitted on terms fixed by Parliament.[9]

When a Federation is to be created by the union of territories which have previously been independent, it will probably be impossible to proceed with the project without a guarantee of continuance of the integrity of territory. In India, the internal boundaries were in some cases accidents of history or administrative convenience, against the revision of which no violent opposition was anticipated. Parliament may by partition or amalgamation of existing Indian territory or a combination of these processes change internal boundaries and allot new names to the newly created States.[10] These matters do not require the procedure for amendment of the Constitution; they can be effected by an ordinary Act of Parliament but no Bill for this purpose can be introduced without the recommendation of the President and it must have been referred to the Legislatures of the States affected for opinion and the period within which the opinion is required must have elapsed.[11] If this procedure is followed, no further reference to the State Legislatures of amendments to the original Bill[12] is necessary. These provisions clearly contemplated a re-drawing of India's internal boundaries and the basic principle on which it was done was linguistic.

[9] Art. 2.
[10] Art. 3.
[11] Art. 4.
[12] The States Reorganisation Bill, 1956, proposed to divide the then State of Bombay into three units but amendments resulted in the abandonment of these proposals. It was held in *Babulal v. State of Bombay*, A.I.R. 1960 S.C. 51 that no reference of the amendments was necessary.

The first step taken was the enactment of the Andhra State Act, 1953, creating a Telegu-speaking State consisting of parts of the pre-existing States of Madras but excluding the City of Madras. In 1953 a States Reorganisation Commission was constituted to make recommendations on the principles and broad lines of reorganisation. Most of the recommendations of the Commission were given legal effect in the States Reorganisation Act, 1956; one important omission related to Bombay but, owing to political pressure, this State was subsequently divided into the Maharashtra and Gujerat States by the Bombay Reorganisation Act, 1960. These and other statutes of lesser importance [13] have redrawn the map of India. After the partition of the sub-continent in 1947, a small territory was claimed by both Indian and Pakistan, actually in Indian occupation; a settlement by which each country should take half was agreed by representatives of the two countries and the question arose as to whether legal effect could be given to this agreement by exercise of the powers referred to above. It was held, in effect, that they only referred to existing Indian territory and did not cover cession of Indian territory to a foreign State, for which an amendment of the Constitution was necessary.[14] Subsequently the Constitution (Ninth Amendment) Act, 1960, ratified territorial agreements with Pakistan and the Constitution (Twelfth Amendment) Act, 1962, the position with regard to Goa, Daman and Diu.

There are now only two categories of units in India, the States and the Union Territories, the Federal principle being only applicable to the former category. The States are Andhra Pradesh,[15] Assam,[16] Bihar,[17] Gujerat,[18] Kerala,[19] Madras,[20] Mysore,[21] Maharashtra,[22]

[13] Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959; Assam (Alteration of Boundaries) Act, 1951; Bihar and West Bengal (Transfer of Territories) Act, 1956; Dadra and Nagar Haveli Act, 1961; Himachal Pradesh and Bilaspur Act, 1954; Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959.

[14] *Reference by President of India under Art.* 143 (1) *of the Constitution*, A.I.R. 1960 S.C. 845.

[15] The northern part of the former State of Madras (Andhra State Act, 1953, Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959) and parts of the former State of Hyderabad (States Reorganisation Act, 1956).

[16] The former State of Assam less territory ceded to Bhutan (Assam (Alteration of Boundaries) Act, 1951) and the territory now forming Nagaland (Nagaland Act, 1962).

[17] The former State of Bihar, less territory transferred to West Bengal (Bihar and W. Bengal (Transfer of Territories) Act, 1956)

[18] The northern part of the former State of Bombay (Bombay Reorganisation Act, 1960) *The States Reorganisation Act, 1956, had transferred territory to Bombay* from Hyderabad, Madhya Pradesh, Saurashtra and Kutch and territory from Bombay to Mysore and Rajasthan.

[19] The former State of Travancore-Cochin less territory transferred to Madras by the States Reorganisation Act, 1956.

[20], [21], [22] See notes on next page.

Madhya Pradesh,[23] *Orissa*,[24] *Punjab*,[25] *Rajasthan*,[26] *Uttar Pradesh*,[27] West Bengal,[28] Jammu and Kashmir,[29] and Nagaland.[30] Whereas the relationship between the Union and the other States is almost identical, the relationship between the Union and Kashmir is *anomalous and is discussed below*.[31] The Territories are Delhi,[32] Himachal Pradesh,[33] Manipur,[34] Tripura,[35] Andaman and Nicobar Islands,[36] the Laccadive, Minicoy and Amindivi Islands,[37] Dadra and Nagar Haveli,[38] Goa, Daman and Diu.[39]

Delhi has been separated from the Punjab so that India's capital lies in an area undisturbed by State politics. Himachal Pradesh is of strategic importance and therefore needs special treatment. The ultimate destination of the former Portuguese territory seems as yet undecided. In Goa, the Hindu population favour union either with Maharashtra or Mysore; the Christian population would prefer the present position to continue. The Island Territories are likely to retain their present status indefinitely, being isolated from the mainland and having neither ethnic, linguistic nor cultural ties with it. The other Territories have an individuality of their own and the people are less sophisticated than the average inhabitant of the State of Assam in which they may ultimately be absorbed.

[20] The southern part of the former State of Madras (Andhra State Act, 1953, and Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959); the States Reorganisation Act, 1956, transferred territory from Travancore-Cochin and Mysore, transferred territory from Madras to Kerala and deprived Madras of the *Laccadive, Minicoy and Amindivi Islands*.

[21] The former States of Mysore and Coorg and territory transferred from Bombay, Hyderabad and Madras (States Reorganisation Act, 1956).

[22] The southern part of the former State of Bombay (Bombay Reorganisation Act, 1960).

[23] The former State of Madhya Pradesh with territory transferred from Madhya *Bharat, Rajasthan, Bhopal and Vindhya Pradesh less territory transferred to* Bombay (States Reorganisation Act, 1956).

[24] The former State of Orissa.

[25] The former States of Punjab and Pepsu (States Reorganisation Act, 1956).

[26] The former States of Rajasthan and Ajmer with territory transferred from Bombay and Madhya Bharat less territory transferred to Madhya Pradesh (States *Reorganisation Act, 1956*).

[27] The former State of Uttar Pradesh.

[28] The former State of West Bengal together with Chandernagore (Chandernagore Merger Act, 1954) and territory transferred from Bihar (Bihar and West Bengal (Transfer of Territories) Act, 1956).

[29] The former State of Jammu and Kashmir.

[30] *Separated from Assam (Nagaland Act, 1962)*.

[31] See pp. 154–160.

[32] The former Part C State of Delhi (States Reorganisation Act, 1956).

[33] The former Part C State of Himachal Pradesh (States Reorganisation Act, 1956).

[34] The former Part C State of Manipur (States Reorganisation Act, 1956)

[35] The former Part C State of Tripura (States Reorganisation Act, 1956).

[36] *The former territory of the Andaman and* Nicobar Islands (States Reorganisation Act, 1956).

[37] Formerly part of the State of Madras (States Reorganisation Act, 1956).

[38] Formerly Portuguese enclaves in West India (Constitution (Tenth Amendment) Act, 1961).

[39] Formerly Portuguese (Constitution (Twelfth Amendment) Act, 1962).

Zones and Zonal Councils

In 1956 India was divided into five zones. The Northern zone comprises Punjab, Rajasthan, Jammu and Kashmir, Delhi and Himachal Pradesh, the Central zone Uttar Pradesh and Madhya Pradesh, the Eastern zone Bihar, West Bengal, Orissa, Assam, Manipur and Tripura, the Western zone Gujarat and Maharashtra, the Southern zone Andhra Pradesh, Madras, Mysore and Kerala. For each zone there is a zonal council composed of a Union Minister who is chairman, nominated by the President, the Chief Minister of each State in the zone and two other Ministers from each State, nominated by the Governor; if a Territory is included in a zone, not more than two persons from such territory are nominated by the President.[40]

The functions of a zonal council is to advise the Union Government and the State Governments represented on it on matters of common concern, particularly in regard to economic and social planning, border disputes, linguistic minorities, inter-State transport and matters arising out of the reorganisation of the States.[41] It meets when summoned by the chairman.[42] The object is to deal with inter-State disputes and prevent parochialism. The council has its own secretariat, the office of chief secretary being held by the Chief Secretaries of the States in rotation, for one year.[43] It may appoint committees, including Union or State Ministers and government servants as advisers.[44] Joint meetings of zonal councils may be arranged to discuss and advise on matters of joint concern to one or more States in different zones.[45]

Inter-State Councils

The Constitution empowers the President to establish an inter-State council, to define its duties, organisation and procedure for the purpose of inquiring into inter-State disputes, investigating matters of common concern to different States or to the Union and a State or States.[46] The council need not be a permanent body and two such councils could be created simultaneously. In exercise of this power, a Central Council of Health has been established, consisting of the Ministers of Health of the Union and the States, which meets once a year and makes recommendations on matters of public health.

The Union may establish a river board, the members of which

[40] States Reorganisation Act, 1956, s. 16.
[41] *Ibid.* s. 21.
[42] *Ibid.* s. 17.
[43] *Ibid.* s. 19.
[44] *Ibid.* s. 18.
[45] *Ibid.* s. 22.
[46] Art. 263.

must be experts in irrigation, electrical engineering, flood control, navigation, water or soil conservation, administration or finance [47] with powers to advise Governments interested on the regulation and development of any inter-State river or river valley so as to resolve disputes and secure optimum results in regard to conservation and control on water, irrigation, water supply, drainage, hydro-electrics power, flood control, navigation, afforestation, soil erosion and prevention of pollution.[48] The board may prepare schemes, allocating costs between Governments concerned, which must be referred to such Governments and confirmed by the Central Government.[49] The board is empowered to acquire property, collect data, conduct research and make preliminary surveys.[50] Disputes between Governments affected must be referred to an arbitrator appointed by the Chief Justice of India.[51] In this connection it is to be observed that whereas legislative power over water supplies, irrigation, drainage and water power is an exclusive State subject [52] this power is expressly made subject to the exclusive Union power over regulation and development of inter-State rivers and river valleys to the extent Parliament declares expedient in the public interest [53] and that Parliament has declared it expedient in the public interest to control such development and regulation to the extent provided in the Act.[54]

The Union may establish an inter-State transport commission to develop, co-ordinate and regulate transport in any area consisting of two or more States by preparing schemes and settling disputes. It may issue directions to State Transport Authorities and Regional Transport Authorities regarding the grant, revocation and suspension of permits to operate transport in any area common to two or more States, which must be obeyed.[55]

A Planning Commission was established in 1950: it consists of the Prime Minister, three other Union Ministers and three full-time members. Its functions are to assess the national resources, to make plans for their exploitation, to devise means of implementing the plans and report progress. It considers claims of different Governments and allots resources.

The National Development Council consists of the Prime Minister, the Chief Ministers of the States and the members of the Planning

[47] River Boards Act, 1956.
[48] *Ibid.* ss. 4, 5, 13.
[49] *Ibid.* s. 15.
[50] *Ibid.* s. 16.
[51] *Ibid.* s. 22.
[52] Sched. 7, List 2, item 17.
[53] Sched. 7, List 1, item 56.
[54] River Boards Act, 1956, s. 2.
[55] Motor Vehicles Act, 1939, ss. 63A–63C.

Commission. Other Ministers are invited when matters with which they are concerned are involved. The Council meets every quarter.

Indian Citizenship

As the preamble to the Constitution states that the people of India by their representatives in the Constituent Assembly gave themselves the Constitution, it was necessary to define, in the Constitution, the founding members of the Indian Republic. Persons who are citizens by virtue of the provisions of the Constitution continue to be such but those provisions do not derogate from the power of Parliament to legislate on all matters relating to citizenship.[56]

India does not recognise State citizenship. A person who, before the commencement of the Constitution, voluntarily acquired citizenship of a foreign State could not become a citizen by virtue of the provisions of the Constitution. A foreign State is any State other than India but the President may declare any State not to be a foreign State for specified purposes.[57] The ban was partially lifted by a declaration on January 23, 1950, that Commonwealth countries were not foreign States but this does not affect the position of Pakistanis.[58] The partition of the Indian sub-continent created unprecedented difficulties in relation to citizenship and the Constitution lays down that, if a person migrated to Pakistan before March 1, 1947, and did not return under a permit for resettlement or permanent return, he is not a citizen.[59]

Every *person* who, *at the commencement of the Constitution* was domiciled in India [60] and (a) was born in India, or (b) either of whose parents was born in India, or (c) had ordinarily resided in India for at least five years immediately preceding the commencement of the Constitution, is a citizen.[61] Every person has a domicile of origin or birth but this may be superseded by a domicile of choice. A minor takes the domicile of his father,[62] a married woman that of her husband,[63] but any other person may acquire a domicile of choice by the combination of residence and intention of permanent residence.[64]

A person who migrated from Pakistan to India would be deemed

[56] Arts. 10, 11; Sched. 7, List 1, item 17.
[57] Art. 367 (3).
[58] *Noor Md.* v *State of Madhya Bharat*, A.I.R. 1956 M B. 211
[59] Art. 7.
[60] *I.e.*, within the territory constituting India at the commencement of the Constitution.
[61] Art. 5.
[62] *Nazirunbai* v. *State of Madhya Bharat*, A.I.R. 1957 M.B. 1.
[63] *Karimmunissa* v. *State of Madhya Bharat*, A.I.R. 1955 Nag. 6.
[64] *Central Bank* v. *Ram Narain*, A.I.R. 1955 S.C. 36.

to be a citizen at the commencement of the Constitution if he or either parent or any grandparent was born in a Province of British India, a Princely State or Tribal Area included in "India" as defined in the Government of India Act, 1935, *and* (a) if he migrated before July 19, 1948 (when the permit system was introduced by the Influx from Pakistan (Control) Ordinance, 1948) and had been ordinarily resident in India since his migration, or (b) if he migrated after that date and had been registered as a citizen by an authorised officer appointed by the Dominion Government; six months' residence was essential before an application for registration could be made.[44] In this context "migration" involves going from one country to another with the intention to establish permanent residence in the country of destination and in practice may be difficult to distinguish from a casual visit. A woman left India for Pakistan in July 1948. She maintained that her object was to seek medical advice. In December 1948 she returned to India on a temporary permit, which suggested that she was domiciled in Pakistan. She returned to Pakistan in April 1949 but, when proceedings were instituted to vest her property in the Custodian of Evacuee Property, she attempted to secure a permit for permanent return to India. Notwithstanding that she was married to an Indian citizen domiciled in India, it was held that she had lost her citizenship by migration to Pakistan.[45] A man born and reared in India carried on a cloth business. He sent some goods to Pakistan and in India in July 1948 swore that he was going to Pakistan to dispose of the goods and would return in two months. He left in August and repeated his story to the High Commissioner for India in Pakistan. The permit system came into force and, instead of the permit for permanent return for which he applied, he was given a temporary permit valid until January 1, 1950. As he stayed in India beyond that date, he was arrested. It was, however, held that his visit was of a temporary nature; he had not migrated and had not lost his Indian citizenship.[47]

A person who or either of whose parents or any of whose grandparents was born in British India, a Princely State or Tribal Area included in "India," as defined in the Government of India Act of 1935, if ordinarily resident outside such territory, would be deemed a citizen if he was registered, whether before or after the commencement of the Constitution, by a diplomatic or consular representative of India in the country in which he was residing.[48]

The provisions of the Constitution considered above came into

[44] Art. 6.
[45] *State of Bihar* v. *Kumar Amar Singh*, A.I.R. 1955 S.C. 282.
[47] *Shabbir Husain* v. *State of U.P.*, A.I.R. 1952 All. 257.
[48] Art. 8.

force on November 26, 1949, but the Constitution generally came into force on January 26, 1950. The Citizenship Act, 1955, is in part retrospective to January 26, 1950, but leaves possible gaps relating to persons whose claims to citizenship arise between November 26, 1949, and January 26, 1950.

The Act recognises citizenship by birth, by descent, by registration, by naturalisation and by incorporation of territory.

Except a child of a non-citizen enjoying diplomatic immunity and a child of an enemy alien born in a place under enemy occupation, every child born in India after January 26, 1950, is a citizen by birth.[45] A child born on a ship or aircraft of Indian register is deemed to be born in India, but persons born within Indian territory on a ship or aircraft of foreign register are not. Only a person born outside India can claim citizenship by descent; his father must be a citizen and, if the father is a citizen by descent only, the claim will fail unless the birth was registered within a year at an Indian consulate or the father was, at the time of the child's birth, in the service of an Indian Government.[46]

Persons of Indian origin, *i.e.*, persons born in British India, the Princely States or Tribal Areas or either of whose parents or any of whose grandparents was born therein, women married to Indian citizens, minor children of Indian citizens and persons of full age and capacity who are citizens of the United Kingdom, Canada, Australia, New Zealand, South Africa, Pakistan, Ceylon, Rhodesia and Nyasaland, Ghana, Malaya, Singapore or Eire may become citizens by registration. No person other than a minor can be registered without taking the oath of allegiance. A person of Indian origin ordinarily resident in India must have been resident in India for six months immediately before applying for registration to the Collector, who must satisfy himself that the applicant is of good character, has close connections with India and intends to make India his permanent home. An appeal lies to the Central Government from the Collector's refusal to register. Persons of Indian origin, ordinarily resident outside the former territory of British India, the Princely States, or the Tribal Areas must apply to the consular officer for the area in which they are ordinarily resident. A woman who is or has been married to a citizen must either have lost or renounced her previous citizenship or undertake to do so if her application is granted; she must also have resided in India or been in government service for a year. Registration of minors is intended to meet such cases as a child born outside India to parents who subsequently become citizens by registration or naturalisation. The application must be made to

[45] Citizenship Act, 1955, s. 3. [46] *Ibid.* s. 4.

the Collector by the guardian and must show that each parent is a citizen, or, if deceased, was a citizen at death. The Central Government may, in special circumstances, cause any minor to be registered. Citizens of Eire and the Commonwealth countries mentioned above cannot be naturalised in India but may be registered if, at the request of the Government of such country, the law under which such citizenship is claimed has been notified in the *Gazette*. No rules have yet been framed for registration of such persons but, in making them the Central Government is to have regard to the conditions under which Indians can acquire citizenship of such country. Registration of citizens of these countries is a matter of discretion and may be refused without assigning reasons; it cannot be called in question in court.[11]

Except citizens of Eire and the Commonwealth countries referred to above, any foreign national or stateless person who is of sound mind and has attained the age of eighteen is eligible for naturalisation, provided that he is not a citizen of a country which denies naturalisation to Indian citizens, that he has renounced his former citizenship, that he has resided in India or been in government service for a year preceding his application, that in the seven years preceding the year aforementioned he has resided in India or been in government service or partly one and the other for a total period of not less than four years, that he is of good character, that he has an adequate knowledge of one of the official Indian languages recognised by the Constitution and that he intends to reside in India or continue in government service. The Central Government may waive these conditions in favour of an applicant who has rendered distinguished service in science, philosophy, art, literature, world peace or human progress.[12]

If foreign territory becomes part of India such persons connected with that territory as are notified in the *Gazette* become citizens.[13]

In the case of a person whose citizenship is in doubt, the Central Government has complete discretion to certify him as an Indian citizen. Unless such certificate was procured by fraud or concealment, it is conclusive proof of citizenship on the date of issue, without prejudice to evidence that he was not a citizen previously.[14]

A citizen of full age and capacity and any married woman who is also a citizen of another country may make a declaration of renunciation of Indian citizenship to the Chief Secretary of the State in which he resides. This is forwarded to the Ministry of Home Affairs

[11] *Ibid.* s. 5.
[12] *Ibid.* s. 6.
[13] *Ibid.* s. 7.
[14] *Ibid.* s. 13.

of the Central Government and, upon registration there, the declarant and, if he is a male, his minor children cease to be Indian citizens, but any such child, within a year of attaining majority, can resume Indian citizenship on declaring his wish to do so. In time of war registration of a declaration of renunciation is withheld until the Central Government otherwise directs.[75]

A citizen who after January 26, 1950, voluntarily acquires the citizenship of another country, including Eire and the Commonwealth countries, automatically loses his citizenship but this does not affect his wife and children. This does not apply to a citizen who, in time of war, acquires citizenship of another country, until the Central Government directs.[76] Acquisition of citizenship by operation of law is not voluntary; if an Indian woman marries a citizen of a country by whose law she becomes on marriage a citizen of that country, the acquisition is not voluntary but, if the law of the country of her husband gives her an option to become a citizen, it is. It is for the Central Government to decide whether the acquisition was voluntary in accordance with rules prescribed. One such rule makes it conclusive proof of voluntary acquisition to have obtained a foreign passport, but this has been held *ultra vires*[77]; the matter is, however, not free from doubt. An Indian citizen is deemed to have voluntarily acquired Pakistan citizenship, if he migrated to Pakistan with intent to make it his permanent home, if he has obtained a certificate of domicile in Pakistan or declared himself to be a Pakistan citizen or of Pakistan domicile, if he has obtained any interest in evacuee property in Pakistan or if he has obtained a temporary permit to enter India from Pakistan. But these provisions do not apply to a migrant who has returned from West Pakistan under a permit for permanent return or resettlement issued under an Indian law or by the Government of India or who, having left India between February 1, 1950, and October 15, 1952, has returned to India with a repatriation certificate issued under an Indian law or by the Government of India.[78]

Citizens of India by naturalisation, persons who, by being domiciled in India at the commencement of the Constitution and having resided in India for at least five years previously, acquired citizenship under the Constitution, citizens by registration, except those who migrated to Pakistan after July 19, 1948, and were registered as citizens before the commencement of the Constitution, and persons of Indian origin, ordinarily resident outside India, registered under the

[75] *Ibid.*, s. 8.
[76] *Ibid.*, s. 9.
[77] *Syed Md. Khan v. Govt. of Andhra Pradesh*, A.I.R. 1957 A.P. 1047.
[78] Citizenship Rules, Sched. 3, para. 5.

Citizenship Act can be deprived of citizenship, if the Central Government is satisfied that this is for the public good Obtaining naturalisation by fraud or concealment, disloyalty or disaffection to the Constitution unlawful trading with the enemy in time of war, being sentenced anywhere to imprisonment for not less than a year within five years of registration of naturalisation and being ordinarily resident outside India continuously for seven years otherwise than on government service, without registering annually at an Indian consulate, are each a ground for deprivation of citizenship[19]

[19] Citizenship Act 1955 s. 10.

of the Central Government and, upon registration there, the declarant and, if he is a male, his minor children cease to be Indian citizens, *but any such child, within a year of attaining majority, can resume* Indian citizenship on declaring his wish to do so. In time of war *registration of a declaration of renunciation is withheld until the* Central Government otherwise directs.[75]

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[75] *Ibid.* s. 8.
[76] *Ibid.* s. 9.
[77] *Syed Md. Khan* v. *Govt. of Andhra Pradesh*, A.I.R. 1957 A.P. 1047.
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[19] Citizenship Act, 1955, s. 10.

CHAPTER 6

DISTRIBUTION OF POWERS

Distribution of Legislative Subject-Matter

Though exceptionally legislative power is conferred on other organs, the legislative power is conferred on Parliament and the State Legislatures. It is for the Legislatures to prescribe rules to govern persons and transactions and for the *judiciary to apply the rules.* If the Legislature interferes in a dispute between two parties, passing a law upholding the claim of one, the law is liable to be impugned as an unconstitutional exercise of judicial power.[1] Persons subjected to detention under an Ordinance challenged the procedure and the validity of the Ordinance and were discharged. An amending Ordinance validated retrospectively the detention orders made and directed the dismissal of cases of other détenus who had also challenged the validity of the orders against them. In so far as the *amending Ordinance prevented the court from determining* the application of the law to the petitioners in the cases dismissed, it was held to be an unwarranted exercise of judicial power,[2] but when, after the court had held electoral rolls improperly prepared and elections held on them void, an Ordinance declared the rolls and elections valid and the orders of the court of no effect, it was held that the Legislature could put an end to the finality of any judicial *decision by enactment; to introduce a legal fiction, declaring* valid what had been held void, was an exercise of legislative power.[3]

Apart from laws defining criminal offences and penalties,[4] there is no constitutional restriction on retrospective legislation. There are, however, other restrictions on the exercise of legislative power; in this Chapter we are mainly concerned with restrictions on the subject-matter of legislation and its territorial application.

The subject-matter of legislation is distributed between Parliament and the State Legislatures. Parliament has exclusive power to make laws with respect to matters on the Union List.[5] This contains ninety-seven items, matters affecting India's international status, matters on which the existence and continuation of the Union

[1] *Ram Prasad* v. *Bihar*, A.I.R. 1953 S.C. 215.
[2] *Basanta Chandra* v. *Emp.*, A.I.R. 1944 F.C. 86.
[3] *Gulabrao* v. *Pandurang*, A.I.R. 1957 Bom. 266.
[4] Art. 20 (1).
[5] Art. 246 (1) and Sched. 7, List 1.

depends and matters requiring identical treatment throughout India, *e.g.*, foreign affairs, the armed forces, communications of national importance, industries of national importance, posts, telecommunications, foreign and inter-State trade, commercial corporations, banking, insurance, negotiable instruments and currency. A State Legislature has exclusive power to make laws with respect to matters on the State List.[6] This contains sixty-six items, matters previously delegated to Provinces and matters not calling for uniform treatment throughout India in which local interest is sufficiently strong to ensure adequate attention, *e.g.*, public order, police, administration of justice, prisons, local government, agriculture, forests, fisheries and intra-State trade. Both Parliament and the State Legislature may make laws with respect to matters on the Concurrent List.[7] This contains forty-seven items covering matters which, for the most part, are comparable to matters on he State List. But concurrent power has been given to the Union either to ensure uniformity of basic principles or to enable the Union to exercise leadership or to enable the Union to prevent consequences outside a State of activity or inactivity within the State. Civil and criminal law and procedure, trade unions, labour welfare, professions, lunacy, electricity, prevention of spread of disease, mechanical vehicles, factories and cinema censorship are concurrent subjects. Matters not enumerated on any list are within the exclusive Union power.[8]

Characterisation of Laws : the Pith and Substance Rule

A statute dealing with a subject-matter not within the competence of the enacting Legislature is a nullity and cannot be vitalised by a constitutional amendment which is not retrospective.[9]

When a statute is impugned as *ultra vires* the enacting Legislature, the court is not concerned with questions of policy or expediency: it ascertains the character of the statute and determines whether it comes within the scope of items on the Legislative Lists allotted to the enacting Legislature.

In characterising a statute the courts look for its "pith and substance," its true nature and character, judged not piecemeal but as a whole, having regard to its object, its scope and its effect on rights and liabilities. Legislation in respect to a particular item can rarely be effective without the inclusion of provisions which, by themselves, would come within the scope of other items and this may involve encroachment on the powers of another Legislature. This

[6] Art. 246 (3) and Sched. 7, List 2.
[7] Art. 246 (2) and *Sched. 7, List 3.*
[8] Art. 248.
[9] *Sonwaldas* v. *State of Bombay*, A.I.R. 1953 Bom. 415.

process, known as "trenching," is legitimate. For instance, though individual provisions of the Bengal Moneylenders Act, 1940, enacted by the Bengal Legislature, by themselves came within the scope of the central powers with respect to banking and bills of exchange [10] given by the Government of India Act, 1935, this did not involve the avoidance of the Act, because its pith and substance was within the provincial power to legislate with respect to moneylenders and moneylending.[11] A provision in the Representation of the People Act, 1951, enacted by Parliament, forbade public meetings on polling day. This, it was contended, was within the exclusive State power to legislate with respect to public order,[12] but it was held that the pith and substance of the Act came within the power of Parliament to legislate with respect to elections to Parliament and State Legislatures.[13] The impugned provision was essential to ensure peaceful elections and was a legitimate exercise of the power of trenching.[14]

But trenching is only justified when necessary to achieve an object within the powers of the enacting Legislature. The extent of the trenching is irrelevant, unless it indicates that the pith and substance is not what it purports to be. If a Legislature purports to act within its powers but in substance and reality transgresses them, the court, having regard, not to the outward appearance of the statute, but to its substance, object, purpose and design, may strike it down as colourable.[15] A Canadian Provincial Legislature, purporting to exercise provincial powers to legislate on local works and undertakings and civil rights in a province,[16] enacted the British Columbia Coal Mines Regulation Act, 1890, which prohibited Chinese adults from working in underground coal mines. It was held that the exclusive application to Chinese showed that the real aim was not to regulate conditions in coal mines but to deprive Chinese of the ordinary rights of inhabitants of the Province; in substance the Regulation was a trespass on the Dominion power over nationalisation and aliens [17] and a colourable piece of legislation.[18]

Interpretation of the Items on the Legislative Lists

The considerations applicable to the validity of laws enacted under a delegated power of legislation, such as that exercised by a

[10] Now Sched. 7, List 1, items 45 and 46.
[11] Sched. 7, List 2, item 30; *Prafulla* v. *Bank of Commerce* (1947) L.R. 74 I.A. 23.
[12] Sched. 7, List 2, item 1.
[13] Sched. 7, List 1, item 72.
[14] *Rameshwar* v. *State of Bihar*, A.I.R. 1957 Pat. 252.
[15] *K.C.G. Narayan Deo* v. *State of Orissa*, A.I.R. 1953 S.C. 375.
[16] British North America Act, 1867, s. 92 (10) and (13).
[17] *Ibid.* s. 91 (25).
[18] *Union Colliery* v. *Bryden*, L.R. 1899 A.C. 580.

local government board, are not applicable to laws made by Parliament or a State Legislature. The generality of a power given to a Legislature is presumed and each general word in an item on the Legislative Lists is construed so as to include all ancillary and subsidiary matters which can fairly be regarded as comprehended in it.[19] A few items, such as railways,[20] consist of a single word; in others there are two or more general words, such as "citizenship, naturalisation and aliens."[21] In other items a general word is followed by illustrative words, usually with words of conjunction as in "contracts *including* partnership, agency . . .,"[22] and "land, *that is to say* rights in or over land, land tenures including the relation of landlord and tenant and the collection of rents . . .,"[23] or sometimes without words of conjunction as in "foreign affairs; all matters which bring the Union into relation with a foreign country."[24] In these items the illustrative words may extend the scope of the general word but cannot cut it down. "Local government, that is to say the constitution and powers of municipal corporations . . . and other local authorities for the purpose of local self-government or village administration,"[25] includes power to legislate for elections of village authorities and the creation of tribunals to decide election disputes.[26] The scope of a general word in an item can only be cut down by express words of disjunction as in "incorporation, regulation and winding up of trading corporations . . . *but not including* co-operative societies"[27] and "drugs and poisons *subject to* the provisions of entry fifty-nine in List I with respect to opium."[28]

If the words used in the items on the Legislative Lists have a special meaning in law, they are to be given that meaning. State Legislatures are empowered to make laws with respect to "taxes on the sale and purchase of goods."[29] In purported exercise of this power, State Legislatures imposed taxes on such transactions as contracts for the installation of electrical and sanitary fittings and materials for the construction and repair of buildings. This was held to be inadmissible. "Sale of goods" must be given the meaning assigned to it in the Sale of Goods Act, 1930, *i.e.*, the transfer of property in goods for a price and a contract of the kind indicated

19 *U.P.* v. *Mst. Atiqa Begum*, 1940 F.C.R. 110.
20 Sched. 7, List 1, item 22.
21 Sched. 7, List 1, item 17.
22 Sched. 7, List 3, item 7.
23 Sched. 7, List 2, item 18.
24 Sched. 7, List 1, item 10.
25 Sched. 7, List 2, item 5.
26 *N. Veeraju* v. *Dt. Munsiff*, A.I.R. 1957 A.P. 393.
27 Sched. 7, List 1, item 43.
28 Sched. 7, List 3, item 19.
29 Sched. 7, List 2, item 54.

cannot be broken down into elements, one of which is a sale and so subject to taxation.[30]

But words and phrases which are not terms of art must be given their ordinary meaning. "Gambling,"[31] for instance, would include lotteries of all kinds, except those organised by the Union or a State, which are on the Union Exclusive List.[32] But a word or phrase of this kind cannot be stretched to cover something never contemplated. "Entertainments and Amusements"[33] obviously refer to something outside the person entertained and do not contemplate a person solving a cross-word puzzle or playing the piano for his own amusement.[34]

Power to legislate "with respect to" a particular matter does not cover enactment of a law having a favourable economic effect on that matter. A Canadian Provincial Legislature enacted a statute suspending payment of principal and interest by a purchaser or mortgager of a farm in years when crops failed. It was held that this did not come within the scope of the provincial power to legislate with respect to agriculture.[35]

Each Legislative List has an item giving power to impose fees in relation to any matter on that list.[36] Heads of Taxation are precisely described on the Union and State Lists and the residuary power of taxation is with the Union.[37] This exposes a State to the temptation to impose a tax in the guise of a fee. A tax is a compulsory exaction of money by authority of law for public purposes appropriated to the general expenses of the State, without reference to a special benefit conferred on the payer. A fee is exigible for permission to do something which the payer would otherwise not be allowed to do, as in the case of a licence to drive a car, or as a *quid pro quo* when a public authority provides the payer with a service, even though the amount may be arbitrarily assessed and the payer may accept the service unwillingly. When the Madras Hindu Religious Endowments Act, 1951, imposed a "fee" of five per cent. on the incomes of temples and *maths*, to meet the expenses of superintending these institutions, the proceeds being paid into the Consolidated Fund, it was held to be an income tax, outside the power of the State Legislature.[38] Contributions by employers to the State Insurance Fund to provide medical services for employees are

[30] *State of Madras* v. *Dunkerley*, A.I.R. 1958 S.C. 560.
[31] Sched. 7, List 2, item 34.
[32] Sched. 7, List 1, item 40.
[33] Sched. 7, List 2, items 33 and 62.
[34] *State of Bombay* v. *Chamarbaugwalla*, A.I.R. 1951 Bom. 1.
[35] *Att.-Gen. Saskatchewan* v. *Att.-Gen. Canada*, A.I.R. 1949 P.C. 190.
[36] Sched. 7, List 1, item 96; List 2, item 66; List 3, item 47.
[37] Sched. 7, List 1, item 97.
[38] *Commissioner* v. *L. T. Swamiar*, A.I.R. 1954 S.C. 282.

a tax.[39] Payments for licences to sell tobacco, though the proceeds were merged in State general revenues, are fees.[40]

A power to regulate would not normally include a power to abolish; it is a power to adjust, govern or manage and might imply a power to tax, if funds were required in peculiar circumstances to secure the objects of a statute as in the case of the Coal Mines (Conservation and Safety) Act, 1952, which levied a duty not exceeding Re.1 per ton raised; this was held within the power with respect to "Regulation of Mines."[41]

A statute will be upheld, though supported by powers on different Lists, one being the Concurrent. The Punjab Trade Employees Act, 1940, required every shop to close on any one day in each week, the day to be communicated to a prescribed authority. It was contended that the State Legislature had no power to make such a law but it was upheld as within the State power "Trade and Commerce within the State"[42] and the Concurrent power "Welfare of Labour."[43]

It may happen that parts of a statute are within the power of an enacting Legislature while others are not and the trespass cannot be condoned as legitimate trenching. The question then arises whether the Act can be upheld in part. To this problem the doctrine of severability applies. The court must consider whether the enacting Legislature, if being aware of the difficulty, would have enacted the valid parts, for which purpose it must have regard to the history of the legislation, its object, title and preamble. If the valid and invalid parts are inextricably tangled or if the valid parts, though independent, form part of a single scheme to be operated as a whole, the whole Act must go. If the valid parts form a law so thin and truncated as to differ in substance and not in degree only from the statute as enacted or if, after expunging the invalid parts, the remainder cannot be enforced without alterations and emendations, severability is not permissible.[44]

Repugnancy between Central and State Laws

Clause 1 of Article 246 says that notwithstanding what appears in the second and third clauses, Parliament has exclusive power to make laws on items on the Union List. Clause 2 says that notwithstanding anything in clause 3, Parliament and, subject to clause 1, a State Legislature may make laws on matters on the Concurrent List.

[39] *Anand Kumar* v. *Employees S.I. Corporation*, A.I.R. 1917 All. 136.
[40] *Gopi Pershad* v. *State of Punjab*, A.I.R. 1957 Punjab 45.
[41] Sched. 7, List 1, Item 54; *Aluminium Corporation* v. *Coal Board*, A.I.R. 1957 Cal. 326.
[42] Sched. 7, List 2, Item 26.
[43] Sched. 7, List 3, Item 24; *Manohar Lal* v. *State of Punjab*, A.I.R. 1951 S.C. 315.
[44] *R. M. D. Chamarbaugwalla* v. *Union*, A.I.R. 1957 S.C. 628.

Clause 3 says that subject to the two preceding clauses, a State Legislature has *exclusive power to make laws on items on the State* List. The object of these priorities is to provide for the contingency of a law, whose pith and substance might come, in the alternative, within the scope of items on two different Lists. Parliament has exclusive power to impose income tax[45] and a State Legislature exclusive power to tax professions, trades, callings and employments,[46] which it usually delegates to local government boards. A tax of the latter kind would come within the scope of the Union power over income tax, which, under Article 246 takes priority over the State power. The State power would therefore not be susceptible of exercise, if Article 276 did not provide that a professions tax not exceeding Rs. 250 per annum would not be liable to be declared *ultra vires* on the ground indicated. The U.P. Towns Act, 1914, permitted a Town Area Committee to tax persons according to their circumstances and a commercial corporation petitioned against its assessment at Rs. 250. It was conceded that the tax was within the scope of both powers referred to above but it was within the upper limit set by Article 276 and so *intra vires*.[47]

In a case under the Government of India Act, 1935, the question arose whether a Provincial Act imposing retail sales on petrol, passed in purported exercise of the provincial power to tax sales of goods[48] was valid, inasmuch as the Act came within the Central power over excise.[49] The Federal Court established a precedent by searching for a construction not involving avoidance of the law and reading the Central power as a general power subject to an exception in favour of the particular power given to the Province. The impugned tax was distinguishable from an excise in that it was imposed on the purchaser whereas, in India, any excise is imposed on the manufacturer.[50] The Assam Legislature, in *exercise of its power to* tax goods and passengers carried by road or inland waterways,[51] imposed a tax payable by the producer, on tea and jute carried by road or waterway, irrespective of distance. An attempt to impugn this tax was defeated; it was distinguishable from an excise, which is leviable on production or manufacture, whereas the impugned tax was not leviable until the goods had been moved.[52] It was contended that the Bombay Lotteries Control and Tax Act, 1948, levying a tax

[45] Sched. 7, List 1, item 82.
[46] Sched. 7, List 2, item 60.
[47] *Western U.P. Power Co. v Town Area*, A.I.R. 1957 All. 433.
[48] Now Sched. 7, List 2, item 54.
[49] Now Sched. 7, List 1, item 84.
[50] *Re Central Provinces Act XIV of* 1938, 1939 F.C.R. 18.
[51] Sched. 7, List 2, item 56.
[52] *H. P. Barua v. State of Assam*, A.I.R. 1955, Assam 249.

being a percentage of the entry fees paid to promoters of lotteries was an income tax [53] and therefore not within the State power but it was held that the tax was imposed, not on profits but on entry fees, regardless of expenses; its object was to control gambling, within the State power,[54] so no question of competition with the Union power could arise.[55]

Article 254 deals with competition between Parliamentary and State laws on the Concurrent List. Clause I provides that in case of repugnancy between a provision of a State law and a provision of a law made by Parliament, which Parliament is competent to enact or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, subject to the provisions of clause 2, the provision of the State law is void to the extent of the repugnancy. It has been held that the words "with respect to one of the matters on the Concurrent List" qualify not only an existing law but also a law made by Parliament. Moreover, the two competing laws must be in respect of the same matter: if they deal with different or even cognate matters, the State law does not give way. It is only when the Parliamentary law and the State law cover the same ground, being within the same item on the Concurrent List that the State law comes within the mischief of the provision. The Bombay Essential Supplies Act, 1947, could not prevail against the repugnant provisions in the (Central) Essential Supplies Act, 1946, as amended in 1950,[56] as both statutes were on the same subject and made in exercise of the power over trade and commerce in essential supplies.[57] But the provisions of the Punjab Restitution of Mortgaged Lands Act, 1939, which permitted a mortgagor of agricultural land to recover the mortgaged land on terms less onerous than those laid down in the Transfer of Property Act, 1882, and the Code of Civil Procedure, 1908, was upheld. The rule under discussion had no application as the first statute was passed in exercise of the exclusively Provincial power over land [58] and the other two were existing laws on matters on the Concurrent List.[59]

Whereas a law made in exercise of a power not alloted to the enacting legislature is a nullity, a State law void to the extent of its repugnancy with a Parliamentary law under the rule under consideration is only in eclipse and recovers its force on the removal of

[53] Sched. 7, List 1, item 82.
[54] Sched. 7, List 2, item 34.
[55] *State of Bombay* v. *R. M. D. Chamarbaugwalla*, A.I.R. 1957 S.C. 699.
[56] *Zaverbhai* v. *State of Bombay*, A.I.R. 1954 S.C. 752.
[57] Sched. 7, List 3, item 33.
[58] Now Sched. 7, List 2, item 18.
[59] Now Sched. 7, List 3, items 6 and 13; *Megh Raj* v. *Alla Rakhia* (1947) 74 I.A. 12.

the repugnancy. The Australian doctrine of the occupied field, *i.e.*, that a State law will only be valid so long as Parliament does not legislate with intent to enact a complete code on the same matter, is not applicable in India.[40]

Clause 2 of Article 254 provides that, if a State law on a concurrent matter is reserved for and receives the assent of the President, it will prevail over the competing existing law or earlier law made by Parliament. But Parliament may subsequently legislate on the same matter, amending or repealing the State law. When enacting the Hindu Marriage Act, 1955, in exercise of the concurrent power over personal law,[41] it repealed Bombay and Madras statutes on the same subject.

Circumstances Justifying Parliamentary Intervention in the State Sphere

Parliament may make laws to implement any treaty, or agreement with a foreign country and any decision taken at any international conference or association,[42] notwithstanding that the subject-matter is on the State List. The Supreme Court has ruled, however, that this power does not extend to cession of Indian territory.[43] It has been used to implement an agreement with Pakistan for service of legal process in the Civil Procedure Amendment Act, 1951, and to implement a decision at the International Labour Conference in 1929 in the Heavy Packages Act, 1951.

To mitigate the handicap to effective legislation imposed by a distribution of powers there are two devices in the Constitution. If the Council of States passes a resolution with the support of two-thirds of the members present and voting, that it is necessary or expedient in the national interest that Parliament should legislate on an exclusive State matter, Parliament may make a law on the matter specified. A resolution of this kind only remains in force for a year but may be extended for a second year. A Parliamentary law made in exercise of this power, in so far as it exceeds the normal competency of Parliament, ceases to have effect six months after the resolution ceases to be in force.[44]

To enable Parliament to enact more permanent legislation on exclusive State matters, it is provided that if the Legislatures of two or more States pass resolutions that it is desirable that such a matter should be regulated in those States by Parliamentary law, Parliament

[40] *Srikant Lal v. State of Bihar*, A.I.R. 1958 Pat. 496.
[41] Sched. 7, List 3, item 5.
[42] Art. 253.
[43] *Reference by the President of India under Art.* 143 (1), A.I.R., 1960, S.C. 845.
[44] Art. 249.

may pass an Act for that purpose. The Act may be subsequently adopted in another State by resolution of the State Legislature. Such an Act cannot be amended or repealed by the State Legislature.[43] The Legislatures of Andhra, Bombay, Madras, Orissa, Uttar Pradesh, Hyderabad, Madhya Bharat, Pepsu and Saurashtra passed resolutions that it was desirable that prize competitions should be controlled by Parliamentary law. The subject-matter was within the State power[44] but the States concerned felt themselves faced with an evil transcending State boundaries and calling for legislation which a single State could not enact. Parliament then enacted the Prize Competitions Act, 1955.

The President, if satisfied of the existence of a grave emergency threatening the security of any part of India by external aggression or internal disturbance, may proclaim an emergency.[45] While the proclamation remains in force, Parliament may legislate on State matters and laws so passed remain in force until six months after the proclamation has been withdrawn.[46] The State legislative power is not affected, either when Parliament exercises this power or when it exercises the power under Article 249 mentioned above but a State law will remain in eclipse, while laws made by Parliament in exercise of either power remain in force, to the extent of the repugnancy. When the Parliamentary laws expire, the repugnant provisions of the State law are reactivated.[47]

After the engagement with the Chinese armed forces in 1962, the President issued a Proclamation of general emergency and Parliament subsequently enacted the Defence of India Act, 1962, which was specifically stated to remain in force until six months after the Proclamation had been withdrawn. It empowered the Union Government *to make rules to secure the defence of India, the public safety,* the maintenance of public order, the efficient prosecution of the war and the maintenance of essential supplies and services; these rules were to be laid before Parliament and were subject to such amendments as were agreed by both Houses within thirty days. The Union Government could delegate its powers to any Union official, any State Government or any State official. It provided enhanced penalties for treasonable activities and for illegal acts in relation to aircraft and explosives. Special tribunals were established, for the trial of offences defined in the rules, with the powers of a court of session. They would follow a simplified and accelerated version of the procedure

[43] Art. 252.
[44] Sched. 7, List 2, item 34.
[45] Art. 352.
[46] Art. 250.
[47] Art. 251.

in a warrant case; only death sentences and sentences of imprisonment of five years and upwards were subject to appeal. Commercial establishments engaged in work likely to assist national defence or the civil defence services set up under the Act could be declared notified establishments and were then entitled to call on the national service tribunals set up by the Act to provide them with labour. The Union or a State Government could requisition property for carrying out the purposes of the Act and fix compensation, on the basis of a reasonable rent, for the expenses of changing one's place of business and compensation for damage during occupation; requisitioned property could be acquired and the compensation fixed on the basis of the market price.

If the President is satisfied that the government of a State cannot be carried on in accordance with the Constitution, he may by Proclamation suspend the State Constitution and declare that the legislative power of the State shall be exercisable by Parliament,[70] which may, however, impose this duty on the President, with power to delegate. Any law made by the President or Parliament or a delegate which Parliament would have been incompetent to make but for the issue of the Proclamation will, unless earlier repealed, cease to have effect one year after the expiry of the Proclamation.[71]

Territorial Operation of Laws

Parliament may make laws for the whole of India or any part thereof.[72] Under the Penal Code an Indian citizen is punishable for an act committed anywhere in the world which would be an offence under it, if committed in India. The Special Marriage Act, 1954, provides for the marriage of Indian citizens before consular representatives in foreign countries. A Parliamentary law cannot be impugned on the ground of extra-territorial application[73] nor because it is repugnant to international law or is not recognised by foreign courts or is impossible or difficult to enforce.[74]

But a State Legislature may only make laws for the whole or part of a State[75] and a State law is not immune from challenge on the ground of extra-territorial operation. But such a challenge can be met by establishing sufficient connection between territory of the State and the person or matter to which the law applies. The Bombay Lotteries Act, 1948, imposed a tax, being a percentage of

[70] Art. 356.
[71] Art. 357.
[72] Art. 245 (1).
[73] Art. 245 (2).
[74] *Wadia v. I.T. Commissioner*, A.I.R. 1949 F.C. 18.
[75] Art. 245 (1).

entrance fees paid to the promoters of puzzle competitions. A promoter of such competitions, resident outside Bombay, was required to pay this tax and impugned the Act for extra-territorial application. It was held that the publication of the invitation, the filling in of entrance forms and the payment of entrance fees within the territory of the State of Bombay constituted sufficient territorial connection to validate the Act.[76] The Bombay Prevention of Hindu Bigamous Marriages Act, 1946, declared void any marriage between two persons, if either had a spouse living, even if solemnised outside Bombay, if either party was domiciled in Bombay and provided a penalty of seven years' imprisonment. State domicile is not recognised in India, so that, in the context, it was held that domicile could mean nothing more than residence; if a person contracted a bigamous marriage outside Bombay in a place where it was permitted by law, the fact that he normally resided in Bombay would not be sufficient to confer competence on the State Legislature. Crime is local and the fact that a person lives in a State does not create sufficient territorial connection between him and the State to justify the imposition of a penalty for an offence against its laws when committed outside the State. A State cannot enforce social legislation outside its boundaries.[77]

Legislation Restricting Inter-State Trade and Commerce

The power of Parliament to legislate on inter-State trade and commerce[78] is subject to a constitutional limitation in favour of freedom of trade, commerce and intercourse,[79] but it is doubtful whether this limitation can have any extensive practical effect, for a Parliamentary law may impose such restrictions as may be required in the public interest.[80] Such a law may not discriminate between States unless Parliament declares such discrimination necessary to mitigate a scarcity of goods in one part of India.[81] Laws in force at the commencement of the Constitution are not liable to avoidance for violating the principle of freedom of internal trade.[82] Provided Parliament has included the necessary declaration in a discriminative law, it would seem immune from impeachment and one may doubt whether a court would be eager to declare a restrictive law not in the public interest.

In the exercise of its power to legislate on intra-State trade and

[76] *State of Bombay* v. *Chamarbaugwalla*, A.I.R. 1957 S.C. 699.
[77] *State of Bombay* v. *Narayan Das*, A.I.R. 1958 Bom. 68.
[78] Sched. 7, List 1, item 42.
[79] Art. 301.
[80] Art. 302.
[81] Art. 303.
[82] Art 305.

commerce,[83] a State Legislature is prohibited from discriminating between States [84] but it may tax goods imported from another State, provided it does not discriminate between such goods and similar goods manufactured or produced within the State. Provided that a Bill for that purpose has received the previous sanction of the President, a State law may impose such reasonable restrictions on freedom of trade, commerce and intercourse as are required in the public interest.[85] A State taxing Act would be liable to avoidance for discrimination of the kind indicated and, while it might be difficult to persuade a court that a restrictive Act was not in the public interest, the courts would not hesitate to consider whether the restrictions were reasonable.

Parliament has exclusive power to impose taxes on sales of goods effected in the course of inter-State trade [86] and no State taxing Act may impose a tax on a sale of goods which takes place outside the State or in the course of import into or export from India; Parliament may formulate principles to determine what sales come within the ban.[87] The Central Sales Tax Act, 1956, defines an inter-State sale as one which occasions transfer of goods from one State to another or is effected by transfer of documents of title while goods are moving from one State to another. A sale takes place within a State, in the case of specific or ascertained goods, when they are within the State when the contract is made; future or unascertained goods must be within the State when appropriated to the contract. A sale is made in the course of export if the sale occasions export or is effected by transfer of documents after the goods have crossed an Indian customs frontier; it is in the course of import if the sale occasions import or is effected by transfer of documents before the goods cross a customs frontier. Sales made for the purpose of export are not protected unless they occasion export, and exemption cannot be claimed because export would be impossible except by sale to a licensed exporter. A Calcutta dealer bought goods which he appropriated to a contract with a Bombay merchant. At the latter's request, the Calcutta dealer got export licences in the purchaser's name and shipped the goods to foreign countries. He claimed the protection of Article 286 from taxation of his purchase under a West Bengal statute but it was held that he exported the goods as agent of the Bombay merchant; there was no privity of contract between him and the foreign consignees; his purchase was taxable.[88]

[83] Sched. 7, List 2, item 26.
[84] Art. 303 (1).
[85] Art. 304.
[86] Sched. 7, List 1, item 92A.
[87] Art. 286.
[88] *Gordhandas v. Banerjee*, A.I.R. 1958 S.C. 1006.

Delegated Legislation

Indian Legislatures can only exercise such powers as they are granted by the Constitution and they cannot confer on any other body what is essentially a legislative power. Even under constitutions which assume that separation of powers is fundamental, this does not prevent some degree of delegation, as when a statute empowers the Executive to make Rules and Regulations to achieve the objects of the statute, but Parliament has not the same freedom in this respect as the Parliament of the United Kingdom.[89] The Legislature must declare the policy of the law, the governing principles and a standard to be applied by the authority to whom power is delegated.[90] Policy and principle may be given in the preamble [91] and the Supreme Court has never been astute to discover violation of the rule laid down. The Essential Supplies (Temporary Powers) Act, 1946, empowered the Central Government to make orders regulating or prohibiting the production, supply and distribution of essential supplies when expedient for maintaining or increasing them or securing their equitable distribution and availability at fair prices; any such order was to have effect notwithstanding repugnancy to any provision of law other than the Act. It was held that the policy and principle were clear. The provision that orders made under the Act were to prevail over other laws by-passed but did not repeal them; assuming that there was implied repeal, the repeal was made, not by the delegate but by the Legislature itself.[92] The Imports and Exports (Control) Act, 1947, stated in its preamble that it was necessary to continue for a limited period the powers, which had existed under the Defence of India Act, 1939, to prohibit, restrict or control export and import of goods; it empowered the Central Government by order to prohibit, restrict or control in all or specified cases, or subject to exceptions, import or shipment as ships' stores of goods of any description and the bringing into any port goods of any description intended to be taken out of India without being removed from the ship. It was held that, as the Act purported to continue pre-existing legislation, the preamble and relevant provisions of the preceding Act could be examined to find the policy and principles for the guidance of the delegate. The preamble to the Defence of India Act referred to the emergency which had called for it and to the necessity of special measures to ensure public safety and the public interest. There was no unconstitutional delegation.[93] There

[89] *Re Delhi Laws Act*, A.I R. 1951 S.C. 332.
[90] *Harishanka Bagla* v. *M.P.*, A.I R. 1954 S C. 465.
[91] *Vasan Lal* v. *Bombay*, A.I.R. 1961 S C. 5.
[92] *Harishanka Bagla* (*supra*).
[93] *Bhatnagars* v. *Union*, A.I.R. 1957 S.C. 473.

is no constitutional objection to conditional legislation, in which the law is complete except that it delegates power to decide when the law shall be brought into force or to extend the period of its operation.[84] A law setting up a court with pecuniary jurisdiction limited to Rs. 10,000 and empowering government to enhance it to Rs. 25,000 was held valid.[85] The Minimum Wages Act, 1948, provided for the fixing of a minimum wage in scheduled industries and authorised government to add to the schedule. It was held to be obvious that additions were to be made to prevent exploitation of labour and the Act only contemplated an addition when, because of labour being unorganised or otherwise, wages were very low. The Act was upheld.[86] A statute establishing a local government board authorised the State Government to extend to the territory under the control of the board any section of the Municipal Act, subject to such restrictions and modifications as it thought fit. It was held that such a power could not be so exercised as to make any essential change in the Act or its policy. The policy of the Act was to forbid local taxation without calling for and hearing objections and the provision respecting taxation had been applied with the modification that objections to taxation need not be called for. Such action was held *ultra vires* the power delegated.[87]

Distribution of Executive Power

Executive power is not limited to the execution of the laws; it is the residue of sovereignty after removing the legislative and judicial powers. It includes determination of policy and its execution, maintaining order, promoting social and economic welfare, direction of foreign policy, carrying on and supervising the general administration of the State. The Punjab Government decided to purchase the copyright in school textbooks and prescribe their exclusive use in State and State-aided schools. Apart from provisions in the Appropriation Act to meet the expenses involved, no statutory provisions were made. A private publisher sought to impugn this as outside the executive power of the State. It was held that as the subject-matter was within the State executive power and as what was done was not forbidden by the Constitution or any law and as no private right was invaded, the action taken could not be assailed.[88]

It is obviously convenient that, as far as possible, executive and legislative power should cover the same field. The executive power

[84] *Inder Singh v. Rajastan*, A.I.R. 1957 S.C. 510.
[85] *K.E. v. Benoari Lal* (1944) L.R. 72 I.A. 57.
[86] *Edward Mills Co., Ltd. v. Ajmer*, A.I.R. 1955 S.C. 25.
[87] *Rajnaran v. Chairman P.A. Committee*, A.I.R. 1954 S.C. 569.
[88] *Ram Jawaya v. Punjab*, A.I.R. 1955 S.C. 549.

of the Union extends to all rights, authority and jurisdiction exercisable by virtue of any international agreement and to all matters on the Union Legislative List. The executive power of the States extends to all matters on the State List. Matters on the Concurrent List are also within the State executive power, except in so far as this is limited by the Constitution or a Parliamentary law.[99] The Essential Commodities Act, 1955, enacted under a concurrent power,[1] empowers the Central Government to make orders regulating the production and distribution of such things as coal, cotton and foodstuffs, confer powers and impose duties on Union and State authorities and give directions as to their exercise and discharge. When Parliament legislates in the exercise of the powers under Articles 249, 250 or 252 discussed above, and when, after the suspension of a State constitution,[2] Parliament exercises the State legislative power, the Parliamentary law may also curtail the State executive power.

In the exercise of its executive power, even over matters exclusively within that power, the State must comply with all Acts of Parliament and all existing laws in force within the State[3] and must not impede or prejudice the executive power of the Union.[4] The Union may give such directions as it deems necessary to compel obedience to these duties. Failure to obey may result in the suspension of the State constitution.[5]

Though communications form a State matter,[6] this is subject to the Union power over railways[7]; highways declared by law to be national highways, shipping and navigation on inland waterways declared by law to be national waterways, as regards mechanical vessels and the rule of the road[8] and maritime shipping are Union matters.[9] Without detriment to these Union powers, the Union executive power extends to giving directions to a State to construct or maintain communications declared in the direction to be of national or military importance or to take measures to protect railways. As the sanction indicated above lies behind every Union direction, the State has no practical option but to comply. If obedience involves expenditure beyond what would have been incurred in the discharge of the normal duties of the State, an agreed sum or a sum awarded

[99] *Arts.* 73, 162.
[1] Sched. 7, List 3, Item 33.
[2] Under Art. 356.
[3] Art. 256.
[4] Art. 257 (1).
[5] Arts. 365, 356.
[6] Sched. 7, List 2, item 13.
[7] Sched. 7, List 1, Item 22.
[8] Sched. 7, List 1, Item 24.
[9] Sched. 7, List 1, Item 25.

by an arbitrator appointed by the Chief Justice of India is recoverable.[10]

Before 1937, the Provincial Governments were subordinate Governments, which generally executed the laws, so that there were very few central services. To have created new federal services to execute central laws would have involved expenditure which could not have been met. The Constitution therefore, like the Act of 1935, provides for delegation of executive power. With the consent of the Government of a State, the President may entrust functions relating to Union powers to a State or its officials and a Parliamentary law may confer powers and impose duties on a State or its officers, notwithstanding that the State has no power to legislate on its subject-matter. If the performance of these delegated functions involves the State in extra expenditure, this may be recovered in the same way as the extra cost of obeying directions regarding construction and maintenance of communications, mentioned above.[11] A recent amendment of the Constitution provides for the devolution of State executive powers to the Union Government or its officers, with the consent of that Government.[12]

The reader concerned to maintain that the Indian Constitution is not truly federal will find in the provisions just considered some basis for his thesis. In a conflict between Union and State policy, the former must usually prevail. State officials, who are, in effect, part-time Union officials, cannot always be equally faithful to their two masters.

In the event of failure of the constitutional machinery in a State the President may issue a *Proclamation, inter alia,* assuming the executive power of the State under Article 356.

Distribution of Financial Resources

The Constitution forbids the levy or collection of any tax save by authority of law.[13] Land revenue is one of India's oldest taxes and an item of importance in a State's budget. Proceedings were instituted to recover land revenue paid on the ground that there was no statutory authority for it. In rejecting the claim, it was pointed out that various statutes recognised the existence of a prerogative right to assess and recover land revenue, but the main point made was that in the present context, as in the constitutional provisions preserving laws in force at the commencement of the Constitution,[14] "law" includes common law and is not restricted to statute law.[15]

[10] Art. 257 (2)-(4).
[11] Art. 258.
[12] Art. 258A.
[13] Art. 265.
[14] Art. 372 (1).
[15] *Gopalan v. State of Madras,* A.I.R. 1958 Mad. 539.

The Union and the States receive revenue from commercial operations; railways, posts, telegraphs and the Reserve Bank are within the exclusive power of the Union.[16] Power to carry on trade is within the executive power of the Union and of a State but a trade carried on by the Union coming within the scope of the State legislative power is subject to control by State legislation and vice versa.[17] Revenue also accrues from the exercise of sovereign functions; coinage and currency is an exclusive Union matter[18]; escheat, lapse, and treasure trove benefit the Union or the State according as they occur in territory under Union or State administration. The Union is also entitled to reimbursement by States in respect of former Princes' privy purses. The States are entitled to grants-in-aid from the Union and the Union and the States have borrowing powers.

But the most important source of revenue is taxation. It is a difficult task to frame a scheme of taxation under a federal constitution, which gives the Centre and the States as of right sufficient resources to enable them to perform their constitutional duties. It is desirable, in the first instance, that the Centre should not compete with the units in the same field. But if, at the time of making the constitution, some heads of taxation are allotted to the Centre and others to the units, there remains the danger that a tax which then produced a large return may subsequently, owing to social or economic changes, become unproductive. A tax on admission tickets to cinemas might decline in productivity if people generally abandoned the habit of visiting the cinema and preferred to watch television. Another difficulty is that owing to different economic conditions, a tax may produce a high yield in one State and a poor yield in another; a tax on industry might be important in a highly industrial State and a tax on agriculture would be less so. The Constitution attempts to meet these difficulties by removing the temptation to compete in the same field, and by making certain taxes imposed by the centre distributable on a basis which can be changed to meet changing conditions.

Customs, export duties, corporation tax, taxes not enumerated in the legislative lists, taxes on capital values other than agricultural land, all taxes in Territories, fees arising from matters on the Union List[19] are imposed by Parliament and the proceeds are allotted exclusively to the Union.

Income tax other than agricultural income tax[20] is imposed by

[16] Sched. 7, List 1, items 22, 31, 38.
[17] Art. 298.
[18] Sched. 7, List 1, item 36.
[19] Sched. 7, List 1, items 83, 85, 86, 96, 97.
[20] Sched. 7, List 1, item 82.

Parliament but part of the proceeds are distributable. The definition of agricultural income in the Income Tax Act, 1922, and the provisions of the Constitution for the distribution of taxes cannot be changed, except on the recommendation of the President.[21] Agricultural income includes rent from agricultural land assessed to land revenue, income derived from agriculture or the preparation of agricultural produce for market or the sale of agricultural produce and rent from buildings used in connection with agriculture.[22] After deducting the costs of assessment and collection, the sums attributable to the Territories and taxes paid on salaries and pensions payable out of the Consolidated Fund of India, the balance is distributed between the Union and the States, and the States share among the States in accordance with orders of the President, made after considering the recommendations of the Finance Commission.[23]

Excise duties, other than duties on liquor, opium and narcotics,[24] are levied and collected by the Union but Parliament may allot the whole or part of the net proceeds to and provide for their distribution among the States.[25]

Estate and succession duties other than on agricultural land,[26] terminal taxes on goods and passengers carried by rail, sea or air,[27] taxes on railway fares and freights,[28] taxes on stock-exchange transactions,[29] taxes on sale of newspapers and advertisements therein[30] and taxes on sales of goods in the course of inter-State trade[31] are levied and collected by the Union but the net proceeds of each tax, after deducting the sum attributable to the territories, are assigned to the States in which it was levied and distributed among them on principles laid down in a Parliamentary law.[32]

Stamp duties on negotiable instruments and certain other documents,[33] and excise duties on medicinal and toilet preparations[34] are levied by the Union but each State in which they are levied collects and retains the proceeds.[35]

Parliament may at any time impose surcharges on the distributable taxes *for the sole purposes of the Union*.[36] While a Proclamation

[21] Art. 274 (1).
[22] Income Tax Act, 1922, s. 2 (1) (*a*). See now Income Tax Act, 1961, s. 2 (1).
[23] Art. 270.
[24] Sched. 7, List 1, item 84.
[25] Art. 272.
[26] Sched. 7, List 1, items 87 and 88.
[27] Sched. 7, List 1, item 89.
[28] Sched. 7, List 1, item 89.
[29] Sched. 7, List 1, item 90.
[30] Sched. 7, List 1, item 92.
[31] Sched. 7, List 1, item 92A.
[32] Art. 269.
[33] Sched. 7, List 1, item 91.
[34] *Ibid.*, item 84.
[35] Art. 268.
[36] Art. 271.

of general emergency is in force, the President may suspend the constitutional provisions for the distribution of the proceeds of taxes imposed by the Union[37] referred to above. An order to this effect must be laid before Parliament and will, in any case, cease to operate at the end of the financial year in which the Proclamation is withdrawn.[38]

The States levy, collect and appropriate land revenue,[39] taxes on intra-State sales of goods,[40] agricultural income tax,[41] succession and estate duties on agricultural land,[42] taxes on land and buildings,[43] taxes on mineral rights,[44] excise duties on liquor, opium and narcotics,[45] taxes on electricity,[46] taxes on advertisements not published in newspapers,[47] taxes on goods and passengers carried by road or inland waterways,[48] taxes on vehicles,[49] taxes on animals and boats,[50] tolls,[51] taxes on professions, trades, callings and employments,[52] capitation tax,[53] and taxes on luxuries, entertainments, amusement, betting and gambling.[54]

Not every one of the enumerated taxes is actually imposed and States have to assign some of their heads of taxation to local government boards. Heads of taxation not enumerated are within the Union power; Parliament enacted the Gift Tax Act in 1956, whereby gratuitous transfers of immovables in India and movables in India and outside India, except when the donor is ordinarily resident in the country where the property passes, subject to exceptions, such as gifts for charitable purposes and gifts to certain relatives, are liable to taxation.

The property of the Union is exempt from taxation by a State or local government board but where such property has been subject to such taxation before the commencement of the Constitution, liability to taxation continues[55] until a Parliamentary law provides otherwise. The continuing liability includes future variations in the rate of assessment but not liability on account of the addition of new property.[56] This exemption does not prevent a State levying sales tax on sales of goods to the Union.[57] Unless Parliament otherwise provides a State may not tax electricity supplied to the Union or used

[37] *I.e.*, Arts. 268–279.
[38] Art. 354.
[39] Sched. 7, List 2, item 45.
[40] *Ibid.* item 54.
[41] *Ibid.* item 46.
[42] *Ibid.* items 47 and 48.
[43] *Ibid.* item 49.
[44] *Ibid.* item 50.
[45] *Ibid.* item 51.
[46] *Ibid.* item 53.
[47] *Ibid.* item 55.
[48] *Ibid.* item 56.
[49] *Ibid.* item 57.
[50] *Ibid.* item 58.
[51] *Ibid.* item 59.
[52] *Ibid.* item 60.
[53] *Ibid.* item 61.
[54] *Ibid.* item 62.
[55] Art. 285.
[56] *Union* v. *Municipal Board, Lucknow*, A.I.R. 1957 All. 432.
[57] *State of Bombay* v. *United Motors*, A.I.R. 1953 S.C. 252.

in the construction or operation of a railway by the Union or railway company operating the railway and any Act imposing such a tax must ensure that the price to the Union or company is less by the amount of the tax than the price charged to other bulk consumers.[38] Unless the President orders otherwise, no State law passed before the commencement of the Constitution shall tax water or electricity stored, generated or consumed by any inter-State valley authority, such as the Damodar Valley Corporation, established by any existing law or by Parliament.[39]

The property and income of a State is exempt from Union taxation but the Union may tax the property used and the income arising from any trade or business carried on by the State. Parliament may, however, declare any such business incidental to the ordinary functions of government, in which case it will be immune from taxation.[40] This constitutional provision does not, *proprio vigore*, render a State business liable to taxation; there must be legislation imposing liability.

In a situation threatening the financial stability or credit of any part of India the President may issue a Proclamation of financial emergency. While this is in force the Union may issue directions to a State controlling its financial business, including directions to impose salary cuts on State officials and to reserve all financial and money Bills for the consideration of the President. In such a situation the salaries of Union officials and judges of the Supreme Court and High Courts are also liable to reduction.[41]

Grants to States

The Constitution provides for annual grants by the Centre to the States for general purposes[42]; the amount is determined by Parliament on principles laid down by the Finance Commission.[43] The needs of a State, as indicated by its budget, its own efforts to raise money to meet them, possibilities of economy, the standards of its social services, and special burdens in financing matters of national importance are all relevant.[44] A State may be given special grants to meet schemes, to promote welfare of Scheduled Tribes and raise the standard of administration in Scheduled Areas, undertaken with the approval of the Centre.[45] Assam is entitled to special grants to

[38] Art. 287.
[39] Art. 288.
[40] Art. 289.
[41] Art. 360.
[42] Art. 275.
[43] Art. 280 (3) (*b*).
[44] Finance Commission's Reports, 1952 and 1957.
[45] Art. 275, Proviso 1.

meet the increased expenditure in its Tribal Areas and for raising the level of administration in them.[66]

The Union or a State may make grants for any public purpose, notwithstanding that it is not within the legislative power of the donor.[67] Advantage has been taken of this power in implementing the Five Year Plans, part of the money necessary for a particular project being furnished by the State and usually a larger part by the Centre.

Borrowing Powers

The Union's power to borrow money or guarantee loans on the security of the Consolidated Fund of India is subject to such limits as may be laid down by Parliament.[68] Within limits set by Parliament, the Union may make loans to States and guarantee loans raised by a State.[69] Subject to limitations laid down by the State Legislature a State may raise loans within India on the security of the State Consolidated Fund,[70] but it may not, without the consent of the Union, raise a loan, if there is outstanding any part of a loan made or guaranteed by the Union or its predecessor[71] and the consent may be subject to conditions.[72] A State cannot raise money outside India and as the States are indebted to the Union, they are not, at present, free to raise loans without the Union's permission. There is, at present, no law restricting the Union's borrowing powers.

The Finance Commission

The Constitution provided for the establishment of a Finance Commission within two years of its coming into force and thereafter every fifth year or earlier if the President thinks it necessary.[73] The Chairman must be a person experienced in public affairs; the other four members must be, have been, or be qualified to be High Court judges, or have special knowledge of government finance and accounts, or have wide experience in finance and administration or have special knowledge of economics. Before making an appointment, the President must satisfy himself that the candidate has no interest prejudicial to his functions as a commissioner. He may be appointed for part-time or whole-time service, for a period and at a remuneration specified by the President. The Commission has the

[66] Art. 275, Proviso 2.
[67] Art. 282.
[68] Art. 292.
[69] Art. 293 (2).
[70] Art. 293 (1).
[71] Art. 293 (3).
[72] Art. 293 (4).
[73] Art. 280.

powers of a civil court to enforce attendance of witnesses, and production of documents.[14] The functions of the commission are to make recommendations on the allocation of the net proceeds of distributable taxes between the Union and the States and among the States, the principles governing grants to the States and any other matter referred to it by the President.[15] The constitutional purpose in providing for the commission is to ensure that questions of the States' share in public money made available by the Union are determined by an impartial body of experts and not on political considerations. The decision rests ultimately with the President or Parliament but generally the recommendations of the commission have been accepted.

The Emergency Powers

The effect of the issue of any of the three kinds of emergency proclamation set out in this chapter is temporarily to upset the balance of powers between the Union and the States in favour of the former; the issue of a Proclamation of general emergency, for so long as it remains in force, makes India a unitary State. If, however, this is to be used as an argument to support the thesis that the Indian Constitution is not federal, it must be pointed out that the emergency powers only make provision for situations not considered in earlier constitutions. It has only been possible to face such situations by distortions of the Constitution, not contemplated by their draftsmen. For instance, in Australia, the Commonwealth defence power has been extended to cover all governmental activity in time of war. The federal power in the U.S.A. to regulate inter-State trade has been permitted to cover almost all economic activities, not to meet such an emergency as war or rebellion but, it would seem, because enhancement of the federal power was deemed essential to good government and national prosperity. The Indian Constitution defines clearly the circumstances under and the procedure by which the Union may constitutionally interfere in the State sphere, limits its duration and provides Parliamentary control over the matter.

The President, if satisfied that a grave emergency threatening the security of India has been created by war, external aggression or internal disturbance or threat of any of these things, may issue a Proclamation of general emergency. This must be laid before Parliament and, unless earlier approved by resolution of both Houses, will expire two months after its promulgation. If the Lok Sabha is dissolved when the Proclamation is issued or within two months

[14] Finance Commission (Miscellaneous Provisions) Act, 1951.
[15] Art. 280.

afterwards, without passing a resolution, a resolution of the Rajya Sabha will keep the Proclamation alive until thirty days after the first sitting of the new Lok Sabha. If the necessary resolutions are passed, the Proclamation remains in force until revoked by the President.[76]

If the President is satisfied that the government of a State cannot be carried on in accordance with the provisions of the Constitution, *he may issue a Proclamation suspending the State Constitution.* This must be laid before Parliament and will cease to operate for more than two months unless previously approved by both Houses; if the Lok Sabha is dissolved, the Proclamation can be kept alive until the new Lok Sabha meets in the same way as a Proclamation of general emergency. But, even if sustained by approving resolutions of Parliament, the Proclamation will expire six months after the latter of the two resolutions unless, within that period, it is prolonged for a further period of six months by fresh resolutions; this process may be repeated but not so as to keep a Proclamation in force for more than three years.[77] This power has been exercised in relation to the Punjab in 1951, Pepsu in 1953, Andhra in 1954 and Kerala in 1959. In the first three it was impossible to constitute a Ministry; in the last the Ministry had lost the confidence of the electorate and chaos was imminent.

The circumstances justifying the issue of a Proclamation of financial emergency have been set out above.[78] Control of the issue of such a Proclamation is exercisable by Parliament in the same way as control is exercised over the issue of a Proclamation of general emergency.[79]

[76] Art. 352.
[77] Art. 356.
[78] See p. 108.
[79] Art. 360.

CHAPTER 7

THE UNION EXECUTIVE

The President: Election and Tenure

The President is elected by an electoral college, consisting of the elected members of Parliament and of the lower or only House in each State Legislature.[1] Each member of a State Legislature has the number of votes obtained by the formula:

$$\frac{\text{Population of the State}}{\text{Number of elected members in the Legislative Assembly} \times 1{,}000}$$ [2]

and each Member of Parliament has as many votes as are obtained by the formula:

$$\frac{\text{Number of votes allotted to members of State Legislatures}}{\text{Number of elected Members of Parliament}}$$ [3]

a decimal of five or more being counted as one and a decimal of less than five being ignored. The first formula ensures equality in voting strength of the members of the college who belong to a State Legislature, for the proportion of members in the Legislature to population is not uniform; the second formula ensures that the total voting strength of the Members of Parliament is equal to that of the members of State Legislatures.

The election is by secret ballot and proportional representation with the single transferable vote.[4] The Presidential and Vice-Presidential Elections Act, 1952, provides for the appointment of a returning officer by the Election Commission, which notifies the dates for nomination, scrutiny and poll. The Union Government has made rules under the Act for the maintenance of a list of members of the electoral college and the conduct of elections. The method employed requires that the successful candidate should receive a quota of half the total of valid votes plus one. Electors mark on the ballot papers their order of preference among the candidates. On the first count only first preferences are considered. If one candidate has received the quota, he is elected. If not, the candidate with

[1] Art. 54.
[2] Art. 55 (2) (*a*).
[3] Art. 55 (2) (*c*).
[4] Art. 55 (3).

fewest votes is eliminated and the second preferences on the papers giving him first preference are distributed among the remaining candidates. If this does not result in one candidate receiving a quota, the process is repeated until it does. The candidate who receives most votes on the first count is not necessarily the final choice; the candidate ultimately chosen is more representative of the wishes of the majority of the electors than a candidate selected by the method of casting an untransferable vote for one candidate, which, if there are more than two candidates, may result in the election of a candidate supported by a minority of voters.

A candidate must be a citizen, not under thirty-five, and qualified for election to the Lok Sabha; he must not hold public office of profit, other than President, Vice-President, Governor or Minister of the Union or a State.[5] If he is a member of a Legislature, he is deemed to have vacated his seat on entering on his office as President.[6] His emoluments are Rs. 10,000 per mensem and the same allowances as were paid to the Governor-General of India[7]; Parliament may revise these but not so as to diminish them during his term.[8] On retirement he is entitled to a pension of Rs. 15,000 per annum.[9]

The President holds office for five years; he is eligible for re-election; he may resign by writing addressed to the Vice-President,[10] and might conceivably do so in case of conflict with his Ministers. He is liable to impeachment for violation of the Constitution. For this purpose it is necessary that written notice, signed by at least one-fourth of the members, should be given in one of the Houses of Parliament at least fourteen days before the resolution is moved. A majority of not less than two-thirds of the total membership of the House is necessary to pass the resolution. If this is done, the charge is investigated by the other House or by a tribunal to which that House refers it. If a resolution declaring that the charge has been sustained is passed by a majority of not less than two-thirds of the total membership of the investigating house, the President is removed from office as from the date of the resolution.[11]

The Vice-President

The Vice-President is elected by the members of both houses at a joint meeting; the election is by proportional representation with the

[5] Art. 58.
[6] Art. 59.
[7] Sched. 2.
[8] Art. 59.
[9] President's Pension Act, 1951.
[10] Art. 56.
[11] Art. 61.

single transferable vote. A candidate must be a citizen of at least thirty-five years of age and qualified for membership of the Council of States; he must not hold office of profit, with the exceptions set out above in relation to the President; if he is a member of any Legislature he vacates his seat on entering on his office.[12] He holds office for five years. He may resign and he may be removed by resolution, of which fourteen days' notice must be given, passed by a majority of the members of the Council of States and agreed to by the House of the People.

The main duty of the Vice-President is to be Chairman of the Council of States.[13] If the office of President is vacant, the Vice-President acts as President until a new President is elected and enters upon his office; if for any reason the President is unable to perform his functions, the Vice-President acts as President until the President resumes. While acting as President, the Vice-President has the same powers, privileges and immunities as the President.[14]

Elections to fill the offices of President and Vice-President must be completed before the conclusion of the terms of the preceding members. Elections to fill vacancies caused by death, resignation or removal must be held as soon as possible after the vacancy occurs. In either case, the person elected is entitled to hold office for the full term of five years.[15]

Elections to the offices of President and Vice-President can only be called in question in the Supreme Court, and Parliament may by law regulate matters relating to such elections. Parliament has enacted the Presidential and Vice-Presidential Elections Act, 1952, which provides for an election petition only after the election is complete, either by a candidate or at least ten electors. The Presidential election in 1957 was challenged in the Supreme Court on the ground that, as elections to Parliament in some parts of India could not be completed in time, the electoral college would be incomplete; the petition was rejected on the ground that such a petition could not be entertained until the Presidential election was complete.[16] The petitioner renewed the attempt after the election, but the petition was rejected as the petitioner was neither a candidate nor an elector.[17]

Position and Powers of the President

The Constitution vests the executive power of the Union in the President[18] and provides that all executive action shall be taken in

[12] Art. 66. [13] Art. 64.
[14] Art. 65.
[15] Arts. 62, 68.
[16] *Khare* v. *Election Commission*, A.I.R. 1957 S.C. 694.
[17] *Khare* v. *Election Commission*, A.I.R. 1958 S.C. 139.
[18] Art. 53.

his name.[19] The President is also given many powers, shortly to be discussed, but the last fourteen years have shown the world that India is a parliamentary democracy in which Ministers decide policy and carry on government, but the Constitution does not say in as many words that the President must act on ministerial advice; what it says is that there shall be a council of Ministers to aid and advise the President; no court may inquire into the question whether any, and if so what, advice was tendered to the President.[20] What the Constitution contemplates is that normally the government shall be carried on by a committee of Ministers selected from the elected representatives of the people, but it recognises that circumstances may arise in which that system may break down, so it is desirable that there should be some authority empowered to continue the government and set about restoring parliamentary government as soon as possible. It is for this reason that the Constitution legally vests the executive power in the President.

But the President has other functions; he is the embodiment of the State in its social activities and ceremonial at public functions, especially in relation to foreign Powers; it is important that these should be properly done. In England the Queen reigns but the Prime Minister rules. Both spheres of activity make such heavy demands upon their time and energy, that one may doubt the wisdom of requiring both to be done by one individual, as in the United States of America.

In India, the Prime Minister, who is the *de facto* head of the Union Executive is chosen by the President, but all other Ministers are appointed on the Prime Minister's advice; all Ministers hold office at the pleasure of the President.[21] But in choosing Ministers, the President can exercise no discretion if, as has been the case since independence, one political party has a clear majority in the Lok Sabha; he is bound to appoint as Prime Minister the leader of the majority party and accept his nominees as Ministers. Congress rule has persisted so long, regularly securing the approval of the electorate,[22] that one may think that one-party rule is a distinguishing feature of Indian democracy. But a split in the ranks of Congress may result in a situation in which no party has an absolute majority and more than one coalition of parties might be able to form a government. The President must exercise his powers in accordance

[19] Art. 77.
[20] Art. 74.
[21] Art. 75.
[22] In 1952, Congress secured 45 per cent. of the votes and 364 out of the 489 seats, in 1957 47·78 per cent. of the votes and 371 out of the 494 seats and in 1962 45·6 per cent. of the votes and 356 out of the 489 seats.

with the Constitution[23]; this will include the spirit as well as the letter; he will consider impartially the claims of the rival aspirants to office and select as Prime Minister the leader of a party which, in combination with another party, is most likely to give continuous stable government and may impose conditions to attain that object.

Though Ministers hold office at the pleasure of the President, in the present situation, he can only dismiss a Minister on the advice of the Prime Minister. But he would not be obliged to accept the advice of a Prime Minister who had lost the confidence of Parliament; he could dismiss him and his Ministers, if he could find others capable of forming an alternative stable government.

The President may dissolve the Lok Sabha.[24] In existing circumstances it is almost unthinkable that he would do so except on the Prime Minister's advice. Up to the present, Indian Parliaments have run their full term, and the expense and administrative dislocation caused by a general election would deter any responsible Indian statesman from advising a premature general election without good cause. It is Parliament, not a court, which decides, possibly by applying different criteria, on an impeachment whether an act of the President is a breach of the Constitution, and the possibility of a dismissal of a Ministry and the dissolution of the Lok Sabha being followed by a triumphant return of the dismissed Ministers, bent on impeaching the President, cannot be ignored. If the present political situation changes to one in which government is only possible by a coalition, the President might be forced to choose between changing the Prime Minister and dissolving the House; in such a situation he would be obliged to have regard to the period which must elapse before a dissolution is constitutionally inevitable and the fact that the government in power has some advantage over its opponents at the election. In most Commonwealth countries conventions have grown up which are applied to the questions of dismissal of Ministers and dissolution of the Legislature, but the continuous rule of Congress has prevented situations arising in which precedents governing the contemplated situations could be created.

The President must be kept informed of the executive decisions and legislative programme of the Ministers; he may call for additional information and may require a decision of a single Minister to be considered by the whole council.[25] The President may advise and warn; it is believed that the first President, Dr. Prasad, expressed doubts as to the expediency of enacting the Hindu Code, which resulted in further consideration. The right to require consideration

[23] Art. 53.
[24] Art. 85.
[25] Art. 78.

of a Minister's decision by the whole Council helps to ensure collective responsibility of the Ministers.

The President nominates twelve persons to the Rajya Sabha.[26] He may, if he thinks the Anglo-Indian community inadequately represented in the Lok Sabha, nominate two members of that community to it.[27] He summons and prorogues Parliament.[28] These functions must obviously be exercised on the Prime Minister's advice.

At the commencement of the first session after each general election and of the first session in each year, the President addresses both Houses of Parliament together and time must be allotted for consideration of the matters raised.[29] In the Constitution, as originally enacted, this "speech from the throne" inaugurated every session and its amendment might be regarded as an enhancement of the power of the Ministers and a curb on the liberty of private Members, for the object was to outline the general policy of government, which may have changed by the second session, and to give the private Member an opportunity of airing his views. The President may send messages to either House, which it is obliged to consider; he may also address either or both Houses and require the attendance of Members.[30] The right to send messages to the Legislature was once enjoyed by the Crown and was preserved in the American Constitution. Despite disuse, it was resuscitated with spectacular success by President Wilson and, if the political situation in India changes, it is not impossible that a similar surprise may disconcert those who assert that it would not be proper for the President to go to the Legislature over the heads of the Ministers. In the ordinary situation contemplated by the Constitution this is undoubtedly correct, but in such a situation one may ask what weight could a President's words have which the Prime Minister's have not? There is no provision in the Indian Constitution, as there is in the Irish Constitution, that the President's message must have the approval of government. The President is not obliged to accept advice to act contrary to the Constitution,[31] and it would not seem necessary to enact that he is not obliged to accept advice to do something which a reasonable man would regard as dangerous to the welfare of the people. Surely the Founding Fathers intended this power to be an instrument whereby the President could carry out his constitutional duty to see that the Constitution is obeyed and that the kind of government it contemplates is continued; that he should be able,

[26] Art. 80.
[27] Art. 331.
[28] Art. 85.
[29] Art. 87.
[30] Art. 86.
[31] Art. 53 (1).

when given advice that he cannot in conscience accept, appeal to Parliament and, incidentally, to the nation. The possibility and the threat of such action by the President is calculated to deter Ministers from tendering improper advice. The Founding Fathers had to look beyond the first fourteen years of the Republic.

The President causes to be laid before Parliament the Budget,[32] the Audit Report,[33] recommendations of the Finance Commission,[34] the reports of the Union Public Services Commission[35] and other reports. His recommendation is necessary for the consideration of any measure involving expenditure of Union money,[36] and for the introduction of any Bill affecting India's internal boundaries.[37]

The President may assent to or veto any Bill passed by Parliament. In these matters the President will presumably act on ministerial advice. Except in the case of a money Bill, he may return it for reconsideration and may suggest amendments. If, after reconsideration, Parliament again passes the Bill, with or without amendment, the President must assent.[38] Some State Bills must be reserved for the President's consideration, and others may be so reserved by the Governor; in respect to such legislation, the President has the powers of assent, vote and return for consideration, but a returned Bill must be reconsidered by the State Legislature within six months; if it is re-presented to the President, he has the same powers as when it first came before him.[39]

The President's powers to appoint to public office are limited, for the power to legislate on recruitment and conditions of service of public officials is vested in the appropriate Legislatures.[40] The Constitution provides for the creation of Public Services Commissions to test and select candidates to the public services and their advice is normally accepted. The President does, however, appoint the Attorney-General,[41] the Comptroller and Auditor-General,[42] the judges of the Supreme Court and the High Courts[43] and the State Governors.[44] Before judges are appointed, certain serving judges have to be consulted but the appointments are apparently made on the advice of the Ministry.

All matters affecting relations with foreign countries are within the exclusive competence of Parliament,[45] so that executive power in such matters is exercised by the Union.[46] In the absence of legislation restricting its exercise, diplomatic business is conducted in the

[32] Art. 112.
[33] Art. 151.
[34] Art. 281.
[35] Art. 323.
[36] Arts. 113, 117 (3).
[37] Art. 3.
[38] Art. 111.
[39] Art. 201.
[40] Art. 309.
[41] Art. 76.
[42] Art. 148.
[43] Arts. 124 and 217.
[44] Art. 155.
[45] Sched. 7, *List 1, Items 10–21.*
[46] Art. 73.

name of the President; diplomatic envoys and consular agents are accredited in his name.

The President may grant pardons, reprieves, respites or remission of punishment, and suspend, remit or commute any sentence passed by a court-martial, or passed under a law to which the executive power of the Union extends, or in which sentence of death has been passed. The President's power covers offences against Acts relating to matters on the Union List but not offences against Acts relating to matters on the Concurrent List, unless Parliament has expressly excluded the State power.[47] The power to pardon offences under the Penal Code, 1860, is with the States and it is explicitly provided that the President's power of *pardon* in relation to death sentences does not affect the powers of the Governor to suspend, remit or commute.[48] Pardon is distinguishable from amnesty, forgiveness offered before trial[49] and from the power to stop proceedings by *nolle prosequi.*[50] Pardon extinguishes the conviction and punishment; reprieve is a stay of execution of sentence; respite means dispense with or postpone sentence; remission refers to the amount of sentence and commutation to a sentence of a different kind. Suspension is a postponement of the commencement of sentence. If the case of an accused person is pending in the Supreme Court, that court only can suspend the sentence.[51]

Legislative Powers of the President

The President, if satisfied that circumstances exist which render *immediate action necessary and both Houses of Parliament are not in* session, may legislate by Ordinance.[52] The Lok Sabha is in session until it is prorogued or dissolved and an Ordinance made shortly before the prorogation is void.[53] To prorogue in order to enable an Ordinance to be passed is improper but not illegal.[54] The satisfaction of the President as to the necessity for action is not justiciable.[55] The President's legislative powers are co-extensive with those of Parliament; not only must the subject-matter be one on which Parliament could legislate but the Ordinance is subject to every constitutional limitation which would apply to an Act of Parliament. An Ordinance may repeal or amend an existing Act and be given retrospective effect.

[47] Arts. 72, 73 and 162.
[48] Art. 72 (3).
[49] *Re Channugadu*, A.I.R. 1954 Mad. 911.
[50] Code of Criminal Procedure, s. 493.
[51] Art. 142. *Nanavati* v. *Bombay*, A.I.R. 1961 S.C. 112.
[52] Art. 123.
[53] *Bidya Chaudhary* v. *Bihar*, A.I.R. 1950 Pat. 19.
[54] *Re Veerabhadraya*, A.I.R. 1950 Mad. 243.
[55] *Lakhi Narayan* v. *Bihar*, A.I.R. 1950 F.C. 59.

An Ordinance must be laid before both Houses and ceases to operate six weeks after Parliament re-assembles or if resolutions disapproving it are passed by both Houses, on the passing of the second resolution.[56] The Ordinance may be withdrawn by the President. If necessary it can be replaced by an Act of Parliament to come into effect on its expiry.

The President issues the Proclamations of emergency.[57] While a proclamation of general emergency is in force, he may issue an order suspending the remedies for infringement of the Fundamental Rights.[58]

The President and the Armed Forces

The supreme command of the defence forces is vested in the President and the exercise thereof is regulated by law.[59]

Defence, the armed forces, military works, war and peace, are within the exclusive legislative power of Parliament[60] but unless it is contrary to the Constitution or any law made by Parliament, action in relation to the armed forces is within the executive power of the Union and may be done without express authority of law, except that public money must be appropriated for it, where necessary. As commander-in-chief the President would be entitled to take such action as he thought necessary to meet a threat of invasion. He has already proclaimed peace with West Germany after Hitler's war[61] and so presumably could declare war without consulting Parliament.

Immunity of the President

The President is not answerable in any court for the exercise of the powers and the performance of any duties of his office or for any act done or purporting to be done in the exercise or performance of those powers and duties.[62] The immunity extends to acts incidental to the exercise of his powers[63] but not to acts not done in his official capacity as President as when he is *ex officio* trustee of a public body and acts in that capacity.[64] "Purporting to be done" implies that the immunity will extend to acts outside or in contravention of the Constitution, providing they purport to be done under the Constitution, at least if they are done in good faith.[65] This immunity is

[56] Art. 123 (2).
[57] Arts. 352, 356, 360; see pp. 97, 98, 108, 110, 111.
[58] Art. 359.
[59] Art. 53 (2).
[60] Sched. 7, List 1, items 1, 2, 4 and 15.
[61] *Gazette of India Extraordinary*, Jan. 1, 1951.
[62] Art. 361 (1).
[63] *Biman Chandra* v. *Mukherjee*, A.I.R. 1952 Cal. 799.
[64] *Gnanamani* v. *Governor*, A.I.R. 1954 Andhra 9.
[65] *Karkare* v. *Shevde*, A.I.R. 1952 Nag. 330.

personal to the President and does not restrict the right of a person aggrieved by governmental action bringing appropriate proceedings against the Union.[46]

No criminal proceedings may be instituted or continued against the President and no process to arrest or imprison him may be issued during his term of office.[47] No civil proceedings may be instituted against the President during his term of office for an act done in his personal capacity, whether before or after he entered on his office, except after two months' notice, setting out the name and description of the claimant, the cause of action and the relief claimed.[48]

Are the President's Powers Excessive?

In the face of the general assumption, based on experience of the first fourteen years of the Republic, that the President is a mere rubber stamp, it may seem foolish to ask whether the Constitution sufficiently guards against the President becoming a dictator, but it cannot be assumed that Congress raj will continue for the thousand years vainly prophesied for Hitler's régime nor is the rule of law, which has been a distinctive feature of India since independence, a general characteristic of the countries which, in the last eighteen years, have emerged from tutelage. Constitutions as liberal as India's have been torn up or ignored; military dictatorships have been set up under a camouflage of double-talk. Let us assume that a President has been elected who has successfully concealed his ambition to establish an authoritarian system of government. One-fourth of the members of a House of Parliament, suddenly aware of the danger, give notice of a motion to impeach the President. Before the fourteen days within which it can be moved, the President dissolves Parliament; a new House must be elected but it need not meet for six months. He dismisses the Ministers and appoints others of his own choice, who for six months need not be Members of Parliament and during that period he can legislate by Ordinance. He can issue a proclamation of emergency, legislate on any subject and deprive the States of their shares in the proceeds of distributable taxes. He can issue directions to States calculated to provoke disobedience and then suspend the States' constitutions. He can use the armed forces in support of the civil power. He can promulgate preventive detention Ordinances and imprison his opponents.

Everlasting vigilance is a price to be paid for democratic government and the best protection against such a situation arising is the method by which the President is elected. If the members of the

[46] Art. 361 (1).
[47] Art. 361 (2) and (3).
[48] Art. 361 (4).

electoral college recognise a duty to elect only a candidate who can be trusted to observe the spirit and the letter of the Constitution, the contingency contemplated cannot arise but, to ensure it, the electorate must be vigilant in rejecting, as members of the Legislature, candidates who do not recognise that duty.

The Council of Ministers

Whereas the Prime Minister is selected by the President, the other Ministers are the choice of the Prime Minister.[69] A Minister on appointment need not necessarily be a Member of Parliament nor need he necessarily resign on losing his seat but if, for a period of six consecutive months, he is not a Member of either House, he automatically vacates office.[70] A Minister may be a member of the Council of States but the Ministers are collectively responsible to the House of the People.[71] The Council of Ministers must be a team, not a leading actor with chorus.[72] On any important question of policy, while it is under consideration, any Minister is free to express his views to his colleagues but, once a decision has been taken, he must give it unqualified support or resign. In fact major decisions are taken by the Cabinet, not mentioned in the Constitution, composed of such principal Ministers as the Prime Minister invites to join it; there are a number of standing committees of the Cabinet, such as the Defence Committee, which make a detailed examination of questions of policy and report to the Cabinet. In April 1961 there were twelve Cabinet Ministers, fourteen Ministers of State and twenty-one Deputy Ministers, all covered by the description of "Minister" in the Constitution. There were nineteen Ministries, seven of which were in charge of Ministers of State without seats in the Cabinet. A Deputy Minister acts as assistant to the Minister in charge of the Ministry. There are also Parliamentary Secretaries, who exercise similar functions but are not "Ministers" for the purposes of the Constitution.[73]

Except in a situation in which the system of cabinet government contemplated by the Constitution has broken down, the Council of Ministers, *though subject to control by Parliament, rules the country*. The President is the formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.[74] Apart from the formulation of policy, the Cabinet has to supervise the implementation of the policy and ensure co-ordination

[69] Art. 75 (1).
[70] Art. 75 (5).
[71] Art. 75 (3).
[72] I. Jennings, *The Constitution of Ceylon*, 1949, p. 89.
[73] D. D. Basu, *Commentary on the Constitution of India*, II, (1962), pp. 437-438.
[74] *Ram Jawaya v. Punjab*, A.I.R. 1955 S.C. 549.

between Ministries. Where legislation is necessary to implement a policy decision, the Ministry must prepare, introduce and steer the Bill through Parliament. The initiative in raising and appropriating money is exclusively vested in the Executive.[19] Ministers must explain the policy of Government to Parliament and seek its support. They must be prepared to furnish information, to meet criticism, to consider counter-proposals sympathetically, unless they are inexpedient or inconsistent with Cabinet policy.

The personality of Mr. Nehru has probably enhanced the prestige of the office of Prime Minister beyond what it will be when held by his successors. The essential functions of this office are to preside at Cabinet meetings, to see that Cabinet decisions are implemented and that the activities of the Ministries concerned are co-ordinated; he must decide inter-departmental disputes. Mr. Nehru held the portfolio of Minister of External Affairs but experience in Britain would suggest that to combine the office of Prime Minister with responsibility for an important Ministry generally operates to the detriment of both offices.

The distribution of portfolios among Ministers is a matter of convenience[20] but normally a Prime Minister with an assured majority will be able to carry on with a smaller Council of Ministers than one obliged to procure support by selecting Ministers from different parties or groups. The existing situation can hardly be described as normal, as claims to office as a reward to those who bore the burden of the struggle for independence have to be considered.

Though a Minister may only vote in the House of which he is a member, he has the right to speak in either House.[21] The English practice of having a parliamentary secretary to represent the Ministry in the House of which the Minister is not a member provides useful training for future Ministers but the rule under immediate consideration does give the Minister the opportunity of making himself heard when the conduct of his department is in question in either House and such a rule was essential when Ministerial government was first introduced in India owing to the small number of Indians with parliamentary experience or capacity.

Government by a Council of Ministers does not mean that the Minister in charge of a Ministry must be an expert in matters conducted by that Ministry; what is required is that he should be an expert in Cabinet government. It is his function to lay down policies and leave their implementation to permanent officials. The

[19] Art. 117.
[20] Art. 77 (3).
[21] Art. 88.

Minister must inspire and supervise but he must not interfere with decisions properly within the province of his permanent officials, merely because parliamentary pressure is imposed on him to do so. Apart from his collective responsibility, which precludes any appearance of lack of support for a Cabinet policy decision, he is individually responsible for the conduct of his department. He cannot be required to resign for any peccadillo committed by a humble and obscure subordinate but he must accept responsibility for the acts of his servants, even though he is not aware of them. A permanent official in a Ministry purchased some shares and the transaction was subsequently held to be improper as the result of an inquiry held by a judge. The Minister resigned and Mr. Nehru, while accepting this as one of the requirements of Ministerial responsibility, remarked that to say that a Minister was always responsible for all actions of officers working under him would be going too far.[78]

Authentication of Executive Acts

Though all executive action must be *expressed* to be taken in the President's name,[79] the President (obviously on the advice of the Ministers) makes rules for the transaction of business and its allocation among Ministers.[80] When an order is passed by a Minister who, under the rules of business, is authorised to make it, the personal consideration of the President is not required.[81] Orders and instruments made and executed in the name of the President must be authenticated as required by rules made by the President and an order or instrument so authenticated cannot be called in question on the ground that it is not an order of the President.[82] In relation to orders made by the Minister in charge of a department, they must usually be authenticated by the signature of a secretary, joint secretary, deputy secretary, under-secretary, or assistant secretary.[83] This does not apply to ministerial orders, *i.e.*, orders issued in compliance with existing instructions nor to orders made in the exercise of powers conferred by law on officials subordinate to the Union Government; it applies to executive acts of the Government of India. If the President's directions as to form and authentication are substantially complied with, the Minister's order is immune from

[78] M. P. Jain, *Indian Constitutional Law*, p. 107.
[79] Art. 77 (1).
[80] Art. 77 (3).
[81] *Emp.* v. *Sibnath*, A.I.R. 1945 P.C. 156.
[82] Art. 77 (2).
[83] Notf. S.R.O. 167 of June 19, 1950, *Gazette of India*, Pt. II, s. 3, of June 24, 1950.

challenge on the ground that it is not the President's order.[84] If, for instance, the order is worded "Government is pleased to do so and so" when it should have been "the President is pleased to do so and so" the immunity will not be affected.[85] When the President's directions have not been substantially complied with, the defect may be cured by an affidavit sworn by a secretary that the impugned order is, in fact, an order of the President.[86] Due authentication does not preclude an order being called in question on other grounds affecting its validity, such as that the recitals are incorrect, or that it is not made by the person entitled under the rules of business to make it or, when the previous satisfaction of the President is a pre-requisite provided by law to the issue of the order, *that the individual so satisfied* was not the person prescribed by the rules of business.[87]

The executive power includes the making of contracts; in fact the day-to-day business of all Ministries involves the constant making of contracts. The Constitution provides that all such contracts shall be expressed to be made by the President and executed on his behalf by such person and in such manner as he directs; neither the President nor the person authenticating it is personally liable.[88] Obviously government could not function if every trifling contract entered into on its behalf by a public servant was repudiated when the prescribed formalities were not complied with. But there have been cases in which a person, having incurred heavy expenses on a contract entered into with a public servant, has been informed that government repudiated the contract, which was void because the government servant concerned was not authorised to execute it. In some of these cases, the court has obviously felt that the equities were with the contractor and has held that the provisions of the Constitution under immediate consideration are directory, not mandatory.[89] But the object of the constitutional provision is to prevent public money being used on improper contracts by public servants and the better opinion seems to be that a contract with government is only valid if the constitutional formalities are observed. These may be prescribed generally by a notification in the *Gazette* or in a particular way in an individual case.[90] Where the forms have not been observed, ratification by government is still possible.[91] If government is

[84] *Dattatraya* v. *Bombay*, A.I.R. 1952 S.C. 181.
[85] *State of Bombay* v. *Purushottam*, A.I.R. 1952 S.C. 317.
[86] *Ibid.*
[87] *Emp.* v. *Sibnath*, A.I.R. 1945 P.C. 156; *Shyamaghana* v. *State*, A.I.R. 1952 Orissa 200.
[88] Art. 299.
[89] See *Rabindra* v. *Forest Officer*, A.I.R. 1955 Man. 49.
[90] *State of Bihar* v. *M/S Karam Chand*, A.I.R. 1962 S.C. 110.
[91] *Chaturbhuj* v. *Moreshwar*, A.I.R. 1954 S.C. 236.

obdurate, the contractor may still claim[92] *compensation for any service rendered or thing delivered to government when there is not intention to act gratuitously.*[93] It has been held that the same relief is available under section 65 of the Contract Act,[94] but this only applies when a contract is "discovered to be void" and it would seem doubtful whether this language applies to the contemplated situation. It has been held that when a contract is void for defect in form, *the government servant who has executed it is personally liable*,[95] as a contract of personal liability is presumed in the case of an agent whose principal cannot be sued.[96]

The Attorney-General is not, as in England, a Minister, nor a Member of Parliament. He is a salaried official appointed by and holding office at the pleasure of the President. He is chief adviser and representative of the Union in legal matters.[97] He has the right to speak in either House and participate in any parliamentary committee to which he may be appointed but he may not vote.[98]

[92] Under the Contract Act, 1872, s. 70.
[93] *Dominion v. Preety Kumar*, A.I.R. 1958 Pat. 203.
[94] *Dharmeswar v. Union*, A.I.R. 1955 Assam 86; *Barada v. State*, A.I.R. 1956 Assam 23.
[95] *Chaturbhuj v. Moreshwar*, A.I.R. 1954 S.C. 236.
[96] Contract Act, 1872, s. 230 (3).
[97] Art. 77.
[98] Art. 88.

CHAPTER 8

PARLIAMENT

The Functions and Structure of the Indian Parliament

Parliament does not govern. Originally, in England, Parliament was only summoned to provide the Sovereign with money. The legislative power developed from the practice of demanding redress of grievances as the consideration for making such provision. By attacking the King's Ministers, Parliament acquired the power to decide who should hold ministerial office and on what conditions. The Indian Parliament has all the powers acquired in the course of its history by the Parliament of the United Kingdom. It provides the Ministers, enforces their responsibility to it, controls them by demands for information and debates on matters of public importance, in the course of which the policy and measure of the Ministers are liable to criticism and grievances are aired. It approves, with or without reservations, the proposals of the Executive for raising revenue and appropriating it. It exercises the normal legislative *function of the Union. The Constitution therefore provides that six* months shall not elapse between one session and the next.[1]

On account of the history of the development of Parliament in England, a British statute is, in legal theory, an Act of the Sovereign taken on the advice of Parliament and each Parliament summoned is a separate Parliament; when Parliament is dissolved, there is no Parliament.

The Indian Parliament consists of the President, the Council of States or Rajya Sabha and the House of the People or Lok Sabha.[2] Unlike the House of Lords, the Rajya Sabha is not subject to dissolution [3]; it may remain in session and function when the Lok Sabha is dissolved; it may, for instance, when the Lok Sabha is dissolved, by resolution prolong the life of a Proclamation of Emergency, which would normally expire at the end of two months, unless approved by the Lok Sabha.[4]

Ordinarily an Indian Bill is approved by both Houses sitting separately and becomes law on receiving the assent of the President, who does not, even in theory, sit in Parliament.

[1] Art. 85 (1).
[2] Art. 79.
[3] Art. 83 (1).
[4] Art. 352 (2), Proviso.

Rajya Sabha

Rajya Sabha consists of twelve members nominated by the President and not more than 238 representatives of the States and Territories.[5] The States are not, like the American States, equally represented. The number of representatives from each State or Territory is set out in the Constitution,[6] and may be amended by ordinary legislation without resort to the special procedure for a constitutional amendment. The number of representatives assigned is apparently based on population and importance. At present Uttar Pradesh has the highest number of representatives, thirty-four, and Nagaland the lowest, one. Among the Territories, Delhi has three representatives and Tripura one.[7] It would seem that Uttar Pradesh with thirty-four, Bombay with twenty-seven, Bihar with twenty-two, Andhra Pradesh with eighteen and Madras with seventeen would be in a position to outvote the representatives of the other States.

The members nominated by the President must be persons having special knowledge or practical experience of literature, science, art or social service,[8] but it would seem that proceedings would not lie to challenge the President's nomination on the ground that a nominee was not duly qualified.[9]

The representatives of each State are elected by the elected members of the Legislative Assembly of that State by proportional representation with the single transferable vote.[10] The method is laid down in rules made under the Representation of the People Act, 1951.

Let us assume that there are six candidates for four seats in the Council of States to be elected by fifty members of the Legislative Assembly of a State. The voters mark their preferences on the voting papers and on the first count only first preferences are considered, each vote counting 100 points. Let us assume the result is:

Arjun	... ...	4 votes	=	400	points
Balwant	... ...	6 ,,	=	600	,,
Champat	... ...	13 ,,	=	1,300	,,
Dasrath	... ...	10 ,,	=	1,000	,,
Ekoji	... ...	5 ,,	=	500	,,
Hassan	... ...	12 ,,	=	1,200	,,

The quota of points necessary to secure election is the lowest figure which will secure the election of each of four candidates

[5] Art. 80 (1) (*a*) and (*b*).
[6] Sched. 4
[7] Sched. 4.
[8] Art. 80 (3).
[9] *Biman Chandra Bose* v. *Dr. H. C. Mukerjee*, A.I.R. 1952 Cal. 799.
[10] Art. 80 (4).

leaving a balance out of the total of 5,000 points, insufficient for the election of a fifth; it is determined by the formula:

$$\frac{\text{Number of valid papers} \times 100}{\text{Number of seats} + 1} + 1$$

In this instance it is 1,001. On the first count Champat and Hassan are elected but Champat has 299 points and Hassan 199 points more than are necessary to secure their election. Their papers, other than those already exhausted, are then assigned to the remaining candidates according to the second preference or, where the second preference is for an elected candidate, according to the third preference. Let us assume that the result is:

Arjun	next preference	on	5	papers
Balwant	"	"	7	"
Dasrath	"	"	6	"
Ekoji	"	"	6	"

and there is one exhausted paper. The unexhausted papers would be worth 2,400 on a first count but the transferable surplus is only 498 points so that the value of each paper transferred is $\frac{498}{24} = 21$ (counting 0.5 or more as 1). The position now is:

Arjun ...	...	400 points	+ 105 =	505
Balwant ...	...	600 "	+ 147 =	747
Dasrath ...	...	1,000 "	+ 126 =	1,126
Ekoji ...	...	500 "	+ 126 =	626

Dasrath has achieved the quota and is elected. He has a surplus of 125 points so his papers must be re-examined. If there were next preferences for Arjun, Balwant and Ekoji, they would have to be valued and distributed as was done after the first count. Let us assume that in this case there are none. It is now necessary to eliminate Arjun, who has the lowest number of points, and transfer *his original four papers to the second or later effective preference* at the full value of 100 points each. Let us assume that all four such later preferences were for Ekoji. This will leave Balwant with 747 points, while Ekoji achieves 1,026, more than the quota, and is elected.

Following American practice in regard to the Senate, the Rajya Sabha is renewed by the retirement of one-third of its members every second year.[11] *While the continuity of the House is preserved, there* is a periodic influx of fresh talent. A candidate for election must be an Indian citizen and not less than thirty years of age and Parliament

[11] Art. 83 (1).

may impose additional qualifications.[12] The Rajya Sabha would seem to have been intended to have a special responsibility to safeguard State rights; a special majority of two-thirds of those present is necessary to authorise Parliament to legislate in the State sphere[13] and, though most arguments for and against second chambers apply to all Legislatures, the argument that the second chamber can make State rights its special concern is particularly cogent when a federal Legislature is under consideration. It also appears to have been intended that the Rajya Sabha should include politicians of greater sophistication and experience than the Lok Sabha, and persons whose views were entitled to respect but who were not prepared to submit to the rigours of an election campaign. In the period 1952–1956 101 Bills were introduced in the Rajya Sabha,[14] including the Hindu Code legislation and other legislation of a controversial kind, and knocked into shape, resulting in considerable saving of time in the other House. The Rajya Sabha's debates on important public questions are usually more moderate and thoughtful than those in the Lok Sabha. The Rajya Sabha does useful work in revising Bills already passed by the other House but there seems to be a convention that it must not veto such legislation unless there has been an unanticipated change in legislative policy, on the expediency of which it feels the electorate should have an opportunity of expressing an opinion. In that it is impotent in financial matters and that the Ministers are not responsible to it, it would be illogical to contend that it is co-equal with the Lok Sabha. Members of that House have said unparliamentary things about the Rajya Sabha, but it would be impossible to maintain that there is any strong feeling in India against second chambers. The Republic started with second chambers in six States; there are now nine with bicameral Legislatures: no advantage has been taken of the power[15] given to Legislative Assemblies to move for the abolition of Legislative Councils.

Lok Sabha

The Lok Sabha normally has a life of five years.[16] The President may nominate not more than two members of the Anglo-Indian community.[17] The same proportion of the seats allotted to a State as members of its Scheduled Castes and Tribes bears to the total population of the State must be reserved for the Scheduled Castes

[12] Art. 84.
[13] Art. 249.
[14] Basu, *op. cit.*, II, 486.
[15] In Art. 169.
[16] Art. 83.
[17] Art. 331.

and Tribes[18] but, apart from the nominated Anglo-Indians, the Members of the House of the People consist of not more than 500 directly elected from territorial constituencies in the States and not more than twenty, selected as Parliament decides, to represent the Territories.[18a] A candidate for membership of the Lok Sabha must be an Indian citizen and not less than twenty-four years of age; Parliament may prescribe other qualifications.[19] Nobody can be a member of both Houses simultaneously[20]; a person chosen for both may, within ten days of the later of the two dates on which he is so chosen, declare in writing to the Election Commission in which House he wishes to serve; in default, he vacates his seat in the Rajya Sabha.[21] If he is chosen for the Rajya Sabha after taking his seat in the Lok Sabha, he vacates the latter on being so chosen; if he is chosen for the Lok Sabha after taking his seat in the Rajya Sabha, he vacates his seat in the latter.[22] No person can be simultaneously a Member of Parliament and of a State Legislature; a person elected to two such seats must, within fourteen days of the publication of the result of the latter election in the *Gazette*, resign from the State Legislature or forfeit his seat in Parliament.[23] A Member may resign in writing addressed to the Chairman or Speaker. He may, subsequent to his election, become disqualified by accepting office of profit under government, other than that of Minister of the Union or a State or office declared by law not to disqualify, or by being judicially declared of unsound mind or by becoming an undischarged insolvent or by losing his Indian citizenship or acknowledging allegiance to a foreign State or in any other way provided by law.[24] Disqualifying office must be under government; the main test is whether government can appoint and dismiss. An employee of a body corporate under Union control, who was not paid out of Indian revenues and was neither appointed nor removable by the Union, was held not to hold office disqualifying him for membership of the Rajya Sabha.[25] "Office" in this context means position or employment to which a profit is attached; this need not be money.[26] It is immaterial that the holder did not, in fact, make any profit. The amount is immaterial but fees to cover out-of-pocket expenses paid to the chairman of a development committee are not profit in the present

[18] Art. 330.
[18a] Art. 81.
[19] Art. 84.
[20] Art. 101 (1).
[21] Representation of the People Act, 1951, s. 68.
[22] *Ibid.* s. 69.
[23] Art. 101 (2); Prohibition of Simultaneous Membership Rules, 1950.
[24] Arts. 101 (3) and 102.
[25] *Abdul Shakur v. Rikhab Chand*, A.I.R. *1958* S.C. 52.
[26] *Ramappa* v. *Sangappa*, A.I.R. 1958 S.C. 937.

context.[27] The Parliament (Prevention of Disqualification) Act, 1959, and other legislation [28] exempt the holders of offices mentioned in them from disqualification; these include members of Indian auxiliary forces, members of university committees, members of special delegations sent abroad, members of committees appointed by government who are only entitled to out-of-pocket expenses and village revenue officials. Differing from the practice in England, where such questions are determined by Parliament, questions of disqualification are referred to the President, who decides according to the opinion of the Election Commission.[29] Either House may declare vacant the seat of a Member who is absent from all meetings for sixty days, excluding periods when the House is prorogued or adjourned for more than four days.[30] A Member who sits or votes without taking the oath of allegiance to the Constitution or knowing that he is disqualified for membership is liable to a penalty of Rs. 500 for each day on which he sits or votes.[31]

The Lok Sabha elects its Speaker and Deputy Speaker, who must be Members of the House.[32] Either may resign by writing addressed to the other; each is liable to removal by a resolution passed by a majority of all Members, of which fourteen days' notice has been given. The Speaker remains in office until the first meeting after a dissolution.[33] Ordinarily the Speaker or Chairman does not vote but has a casting vote in the event of a tie.[34]

The Chairman of the Rajya Sabha and the Speaker of the Lok Sabha exercise similar powers set out in Rules of the Houses. He determines the days and hours of sitting and rising and adjournments. He determines the order of business in consultation with the Leader of the House. He rules on the admissibility of questions. His consent is necessary to a motion to adjourn to discuss a matter of urgent public importance. He appoints Chairmen of select committees and nominates members of standing committees. He decides who shall speak and in what order; all speeches must be addressed to him. He may select amendments to any motion and decide the order in which they shall be taken. He may take such steps as he thinks necessary to ensure prompt dispatch of financial business. His decision is final on all points of order. He puts questions to the vote and his declaration of the result is final.

[27] *Ravanna* v. *Kaggeerappa*, A.I.R. 1954 S.C. 653.
[28] Representation of the People (Miscellaneous Provisions) Act, 1956; Wakfs Act, 1954; Rubber (Production and Marketing) Act, 1954, *et al.*
[29] Art. 103.
[30] Art. 101 (4).
[31] Art. 104.
[32] Art. 93.
[33] Art. 94.
[34] Art. 100.

Parliamentary Procedure

Each House may make rules of procedure subject to the Constitution[25] and, as already indicated, each House has done this and has a Rules Committee to recommend amendments and additions. Some rules are laid down in the Constitution itself. Their object is to ensure the speedy transaction of business in an orderly manner, while affording the opposition reasonable opportunities for criticising the Ministry and expressing its views. Some rules deal with speeches. They must not be read; they must be relevant to the issue and not repetitive. They must not refer to matters *sub judice*, or make a personal charge against a Member or refer offensively to proceedings in an Indian Legislature. Expressions imputing fraud, deceit or improper motives to another Member are not allowed.

Except when the Constitution demands a special majority, as in amending the Constitution, all questions are decided by a majority of Members present. Proceedings in Parliament are not invalidated by any vacancy or by participation of a person not entitled. A quorum is one-tenth of the total membership of a House; when there *is no quorum the Chairman or Speaker must adjourn or suspend* the House until a quorum is present.[26]

The first half-hour of a sitting in each House is reserved for questions. The Rules provide that any Member may address a question on any matter of public importance to the Minister concerned, usually giving ten days' notice. Unless a question is marked with an asterisk or star, the answer will be written: even if it is starred, the Chairman or Speaker may decide that a written answer would be more appropriate; oral answers to only three questions are permitted on one day, written answers being given for others. If a starred question is not reached in the time allotted, a written answer is given. Any Member may, with the consent of the Chairman or Speaker, put a supplementary question to secure elucidation of a matter of fact in an oral answer.[27]

The Houses pass resolutions, usually recommending government action or approving or condemning action taken on matters of general public interest. After a resolution has been moved, no motion dealing substantially with the same matter may be moved until a year has elapsed. A Member who is not a Minister must give fifteen days' notice and take his chance at the ballot for precedence on a day allotted for private Members' resolutions.[28]

[25] Art. 118.
[26] Art 100.
[27] Rules of Procedure in Lok Sabha, 32-53; Council of States Manual, Rules 29-48.
[28] Rules of Procedure in the Lok Sabha, 170-183; Council of States Manual, Rules 135-147.

Any proposal put to a House for approval which is not otherwise described is a motion. It may be, *e.g.*, a motion of no confidence, a motion to remove a judge, a motion for papers or a motion to adjourn to discuss a matter of urgent public importance. Any Member may give notice before the day's sitting commences but it cannot be moved without the consent of the Chairman or Speaker. After it has been moved, it is put to the House and amendments may be moved. The motion and amendments are then discussed and the matter is put to the House and voted on. A motion may not be moved on a matter substantially dealt with in a previous motion in the same session.[39]

To obtain elucidation of an oral answer to a question, a Member may secure a half-an-hour discussion, on a matter of public importance with the consent of the Chairman or Speaker, by giving notice and stating his reasons.[40] If the Speaker or Chairman approves, he fixes a date in consultation with the Leader of the House and sets a time limit for the discussion.[41]

A Bill, other than a Money Bill or Financial Bill, may be introduced in either House.[42] The procedure is substantially the same in both Houses. A Minister may require the Speaker to publish a Bill in the *Gazette*. If this is done, it is not necessary to move for leave to introduce it but a private Member must give notice of his intention to move for leave to introduce a Bill, supply a copy of it and a statement of objects and reasons; if it invokes expenditure, it must be accompanied by an estimate. On a motion for leave to introduce, the Speaker may, before putting the motion, allow brief speeches by the mover and an opponent. After a Bill has been introduced and copies have been made available, the Member in charge may propose that it be considered or referred to a select committee or a joint committee of both Houses or circulated for opinion. At this stage only discussion of the general principles is allowed and the only permissible amendments are to deal with the Bill otherwise than as the Member in charge has proposed. When a Bill has been reported on by a select committee, the Member-in-Charge may move that it be taken into consideration or re-committed or circulated; if he takes the first course, an amendment may be moved to take one of the others. On a motion to consider the Bill as reported on, the debate is confined to matters in the report and alternative suggestions consistent with its principles. Normally one

[39] Rules of Procedure and Conduct in Lok Sabha, 338–342; Council of States Manual, Rules 148–156.

[40] Rules of Procedure in Lok Sabha, 55; Council of States Manual, Rule 48A.

[41] Rules of Procedure in Lok Sabha, 193–196.

[42] Art. 107.

day's notice of any amendment must be given. A Member who speaks to the original motion cannot move an amendment. After the motion to take the Bill into consideration has been passed, with or without amendment, the Member-in-Charge may move that the Bill be passed: discussion then is restricted to arguments for and against the Bill and formal amendments.[43]

If a Bill is passed by the Lok Sabha, it is sent to the Rajya Sabha, where a Minister or Member may give notice of motion to take it *into consideration. On the day fixed for discussion only the general* principles may be discussed. If the motion is carried, it is then considered clause by clause, but to the motion to take it into consideration any Member may move an amendment to refer it to a select committee. If that is carried the subsequent procedure is as indicated above in the case of a Bill originating in the Lok Sabha. If a Bill originates in the Rajya Sabha and is transmitted to the Lok Sabha there is no important difference in procedure from that set out above.[44]

If the Bill is passed in the second House without amendment, it is presented to the President. If it is passed with amendments, it is returned to the originating House; if the amendments are accepted there or if further negotiations between the Houses result in agreement, the Bill, as agreed, is presented to the President.[45] If the second House rejects the Bill or if agreement on the amendments cannot be reached or if six months have elapsed since the Bill was received by the second House, which has not passed it, the President may summon a joint session of the Houses over which the Speaker presides. If the second House has rejected the Bill outright, only such amendments as the delay in passing the Bill has made essential can be discussed. If the Houses have disagreed on certain amendments, those and other amendments relevant to them may be discussed. The Bill as passed by a majority of those present is deemed to be passed by both Houses. If the Bill has lapsed by a dissolution of the Lok Sabha, a joint sitting cannot be called, but if the Bill has not lapsed, a joint sitting may be called notwithstanding that the Lok Sabha has been dissolved.[46] A Bill pending in the Lok Sabha or, having been passed in the Lok Sabha, is pending in the Rajya Sabha, will lapse on the dissolution of the Lok Sabha, unless the right to call a joint sitting has accrued by a delay of six months in the Rajya Sabha before the dissolution. A Bill pending in the Rajya Sabha

[43] Rules of Procedure in Lok Sabha, 64–95; Council of States Manual, Rules 49–96.

[44] Rules of Procedure in Lok Sabha, 114–132. Council of States Manual Rules, 119–127.

[45] Art. 111.

[46] Art. 108.

and not passed by the Lok Sabha does not lapse on the dissolution of the Lok Sabha. A pending Bill does not lapse on prorogation.[47]

The Rules of Procedure provide means of combating attempts to prevent the timely conclusion of parliamentary business. At any time after a motion has been made, any Member may move that the question be now put. This is called a closure motion. The Chairman or Speaker may refuse to accept it if the matter has not been sufficiently discussed or it is an attempt to infringe the rights of the Opposition. If it is accepted, put and carried, the original motion may be put without further debate.[48] The guillotine is the fixing by the Speaker of a time limit for the discussion of a stage of a Bill or the whole Bill or a motion when debate is unduly protracted; when the time limit is reached, the Speaker puts every question necessary to dispose of all outstanding matters.[49] The Kangaroo is the selection by the Speaker of only such amendments as can profitably be discussed by the House.[50] There are other provisions in the Rules whereby a time limit can be fixed in advance for the disposal of business; when this is reached all necessary questions are put.[51] The validity of proceedings in Parliament cannot be called in question in any court on grounds of irregularity of procedure.[52] The certificate of the Speaker that a Bill has been duly passed is conclusive. An Act cannot be impugned on the ground that the rules of procedure were not observed.[53]

Financial Business

The constitutional provisions regarding financial business are designed to keep it strictly under the control of the Executive. No demands for a grant of money can be made except on the recommendation of the President[54]; no Bill and no amendment involving expenditure from the Consolidated Fund shall be introduced or moved unless recommended by the President.[55] The Budget, which is laid annually before Parliament at the instance of the President, is in two parts.[56] The first part is not subject to the vote of Parliament but is open to discussion, to give Members the opportunity of criticising the actions of the Ministry[57]; it shows expenditure charged

[47] Art. 107 (3)-(5).
[48] Rules of Procedure in Lok Sabha, 362; Council of States Manual, Rule 206.
[49] Rules of Procedure in Lok Sabha, 363; Council of States Manual, Rule 207.
[50] *Rules of Procedure in Lok Sabha, 346; Council of States Manual, Rule 82.*
[51] Rules of Procedure in Lok Sabha, 190, 191; Council of States Manual, Rule 154.
[52] Art. 122 (1).
[53] *Ram Dubey v. Govt. of M.B.*, A.I.R. 1952 M.B. 57.
[54] Art. 113 (3).
[55] Art. 117 (1).
[56] Art. 112 (1) and (2).
[57] Art. 113 (1).

upon the Consolidated Fund by the Constitution or Act of Parliament; these include the emoluments and allowances of the President, the Chairman and Deputy Chairman of the Rajya Sabha, the Speaker and Deputy Speaker of the Lok Sabha, the salaries, allowances and pensions of the judges of the Supreme Court and the Comptroller and Auditor-General, the pensions payable to judges of the Federal Court, judges of the High Courts, including High Courts in Governors' Provinces of the Dominion of India, debt charges and sums required to satisfy decrees and arbitrators' awards.[38] The second part contains demands for grants under classified heads to meet anticipated expenditure during the relevant financial year.[39] Usually the total demand for each Ministry is set out and followed by detailed estimates. These may be assented to, reduced or refused by the Lok Sabha; they may not be increased.[40] The whole Budget is subject to discussion in both Houses. When the grants have been made, the Appropriation Bill, providing for them and the expenses charged on the Consolidated Fund, is introduced; no amendment varying the amount or destination of any grant can be moved; no money can be drawn from the Consolidated Fund except under the authority of an Appropriation Act.[41]

Inevitably from time to time forecasts of expenditure prove unduly optimistic; it is then necessary, later in the financial year, to ask Parliament for supplementary grants; the same procedure is followed as with the Budget.[42] The Lok Sabha is also empowered to authorise advances to meet expenditure incurred before the procedure for presentation of the Budget and passing the Appropriation Act has been completed. Some undertakings of the Union involve heavy expenditure; their completion is long and uncertain and details of the expenditure cannot be anticipated and set out in the manner usual in a Budget. To meet the cost of such undertakings, the Lok Sabha may pass a vote of credit for a lump sum. The House may also make an exceptional grant to cover expenditure not directed to the current service in a financial year.[43]

In the course of the Budget debates a Member may give notice of motion to reduce a demand by Re. 1 with precise particulars of the policy underlying the demand of which he disapproves; the discussion will then be restricted to the points he has raised but an alternative policy may be urged. Alternatively he may give notice to move a reduction of a demand by a specified amount or that a

[38] Art. 112 (3).
[39] Art. 112 (2).
[40] Art. 113 (2).
[41] Art. 114.
[42] Art. 115.
[43] Art. 116.

particular item included in the demand be omitted as a measure of economy, setting out the point he wishes to discuss; the discussion will then be confined to how the economy can be effected. A third alternative is to give notice of motion to reduce a demand by Rs. 100 *in order to ventilate a specified grievance relating to some matter* under the control of a Union Ministry; the discussion will then be restricted to the specified grievance.[44]

A Money Bill cannot be introduced in the Council of States.[45] A Money Bill is a Bill containing *only* provisions dealing with

(a) *the imposition, abolition, remission, alteration* or *regulation* of any tax;
(b) the regulation of borrowing of money or giving a guarantee by the Union Government or the amendment of any law dealing with financial obligations assumed by the Union;
(c) the custody of the Consolidated Fund or the Contingency Fund, the payment of money into or withdrawal from such Funds;
(d) the appropriation of money from the Consolidated Fund;
(e) declaring expenditure charged on the Consolidated Fund or increasing its amount;
(f) the receipt of money on account of the Consolidated Fund or the public account, the custody or issue of such money, or the audit of Union or State accounts;
(g) matters incidental to the above.

A Bill is not a Money Bill because it provides for fines or pecuniary penalties, or payment of fees for licences or services or because it deals with taxes imposed by local government boards or for local purposes. The Speaker's decision as to whether a Bill is a Money Bill is conclusive and his certificate to that effect is indorsed on the Bill when sent to the Rajya Sabha.[46] The Rajya Sabha must return the Bill with its recommendations within fourteen days, or it will be deemed to have been passed by both Houses. The Lok Sabha may accept or reject the recommendations of the Rajya Sabha, but in either case, the Bill will be deemed to have been passed by both Houses in the form finally approved by the Lok Sabha.[47]

No Bill and no amendment making provision for any matter which, if it stood alone, would come within the definition of Money Bill can be moved, except on the recommendation of the President and no Bill making such provision may be introduced in the Rajya Sabha.[48]

[44] Rules of Procedure in Lok Sabha, 209.
[45] Art. 109 (1).
[46] Art. 110.
[47] Art. 109 (2)-(5).
[48] Art. 117.

The accounts of the Union and the States are kept in the form prescribed by the Comptroller and Auditor-General, with the approval of the President.[69] His reports on the accounts of the Union are submitted to the President, who causes them to be laid before each House.[70] The Lok Sabha has a committee on public accounts which examines these reports and satisfies itself that money has been disbursed in the manner authorised by law and that any re-appropriations have been made in accordance with existing rules; where grants have been exceeded, the committee must examine the circumstances and make recommendations. The committee also examines the income and expenditure accounts and balance-sheets of State trading corporations, schemes and projects.[71]

The proceeds of taxes, duties and other revenue, loans raised by the Union and money received in repayment of loans are paid into the Consolidated Fund. All other public moneys received by the Union are paid into the public account.[72] For the purpose of meeting unanticipated calls on the public purse before supplementary estimates can be presented to Parliament and its sanction for the expenditure obtained, Parliament may establish a Contingency Fund. The Contingency Fund Act, 1950, creates such a fund, in which fifteen crores is paid from the Consolidated Fund; this is held by a Secretary in the Finance Ministry.

Parliamentary Privileges and Immunities

To enable Members individually and collectively as a House to fulfil their functions, they must, like the courts, be given certain privileges and immunities not enjoyed by ordinary individuals or societies *but it must be emphasised that a breach of privilege is an act intended* to prevent a Member or a House performing its functions: holding up a Member on his way to the House, with intent to prevent him recording his vote on a division is a breach of privilege but delaying his arrival by normal police traffic control is not. Parliamentary privilege must not be wider than necessary to achieve the object indicated and limits must be set. Some are set by the Constitution; each House may define its own privileges and, until it does so, the privileges and immunities of the House of Commons of England, as at the commencement of the Constitution, apply.[73] The Constitution says that, subject to its provisions and the rules of procedure, there shall be freedom of speech in Parliament[74]; this implies that

[69] *Art. 150.*
[70] Art. 151.
[71] Rules of Procedure in Lok Sabha, 308.
[72] Art. 266.
[73] Art. 105 (3).
[74] *Art. 105 (1).*

the freedom of speech is subject to the restrictions imposed in the chapter on Fundamental Rights, but the Constitution also says that no Member of Parliament shall be liable to legal proceedings for anything said or vote given by him in Parliament or any committee thereof and no person shall be liable for publishing, under the authority of a House, any report, paper, vote or proceeding.[75] This particular provision is not qualified, like that previously mentioned, by the words "subject to the Constitution" and it has been held that the immunity from legal proceedings so declared is absolute: the only protection against the abuse of the privilege is in the hands of the Speaker or Chairman.[76] The absolute immunity which attaches to a question tabled by a Member and disallowed as defamatory by the Speaker does not attach to the publication of the question in a newspaper at the instance of the Member.[77] The qualified privilege accorded in England to a faithful report of a parliamentary debate[78] was formerly denied in India; it was held that privilege only attached to a publication expressly authorised by the House.[79] But the position has been changed by the Parliamentary Proceedings (Protection of Publication) Act, 1956; no person is now liable for publishing a substantially true report of proceedings in either House, unless it is done with malice or the publication is not for the public good. No discussion is permissible in Parliament of the official conduct of a judge of the Supreme Court or a High Court except on a motion to remove him.[80]

No legislation has yet been passed to define the privileges of Members. As the clauses giving immunity to conduct in Parliament and introducing the privileges of the Commons in England[81] are not qualified by words such as "subject to the provisions of the Constitution," it would seem that, so long as the privileges and immunities of the House of Commons operate, they are, by reference, part of the Constitution and not liable to be disallowed as repugnant to the Fundamental Rights or any other constitutional restriction. But if they were replaced by privileges and immunities enacted by Parliament, those would be sub-constitutional legislation and liable to avoidance for transgressing a constitutional limitation. Some of the immunities and privileges of the House of Commons are excluded

[75] Art. 105 (2).
[76] *Sharma* v. *Sri Krishna*, A.I.R. 1959 S.C. 395; *Surendra* v. *Nabakrishna*, A.I.R. 1958 Orissa 168.
[77] *Jatish* v. *Hari*, A.I.R. 1961 S.C. 613.
[78] *Wason* v. *Walter* (1868) 4 Q.B. 73.
[79] *Dr. Suresh Chandra* v. *Punit Goala*, A.I.R. 1951 Cal. 176
[80] Art. 121.
[81] Art. 105 (2) and (3).

by provisions of the Constitution expressly dealing with their subject-matter[43] and others are not relevant in India.[44] In England, some privileges, those available to the House collectively, are assumed to continue, while others, available to individual Members, are demanded by the Speaker at the commencement of each Parliament and granted as a matter of course. In the Indian context the most important privilege of the latter class is freedom from arrest during a session and for forty days preceding and succeeding a session. But when the Legislature is prorogued and it is not known when it will be summoned, the privilege cannot be claimed.[45] In England this privilege does not extend to proceedings in bankruptcy, to proceedings for criminal contempt, to preventive detention (in the Indian sense), to a prosecution for an indictable offence or to proceedings calling for security to keep the peace. There are obvious difficulties in defining Indian equivalents. A person arrested for a civil debt within the prescribed period can obtain a writ of habeas corpus from a High Court.[46] There is no immunity from preventive detention; a Member so detained can claim the right to communicate with the Legislature but not to attend sittings.[47] Under the Rules of the Lok Sabha, a court taking a Member into custody or committing him to gaol is obliged to inform the Speaker.[48]

The collective immunities of the House of Commons include the right to exclude strangers, the right to prohibit publication of its debates and the right to enforce observance of its privileges by fine, imprisonment and, in the case of breaches by its Members, by expulsion. As has been indicated, any act calculated to hinder or obstruct the transaction of the business of the House is prima facie a breach of privilege. Interfering with the officers of the House in the discharge of their duties, breaking rules of procedure, offering to bribe a Member, assembling near the House in a threatening manner, molesting Members, publishing statements calculated to bring the House into public contempt, publishing matters ordered to be expunged from its records are all prima facie breaches of privilege.

A Member of the Lok Sabha may, with the consent of the Speaker, raise a question of privilege. If on a motion before the House leave is granted, the question may be considered by the

[43] *e.g.*, the right to freedom of speech is excluded by Art. 105 (1) and (2), the right to provide for the due composition of the House is excluded by Arts. 103 and 324–329 and the right to regulate the proceedings of a House by Arts. 118, 119.

[44] *e.g.*, the right of access to the Crown and the right to have the most favourable construction placed on its proceedings.

[45] *Ansumali v. Bengal*, A.I.R. 1952 Cal. 632.

[46] *In the matter of Venkateswarlu*, A.I.R. 1951 Mad. 269.

[47] *Re Anandan*, A.I.R. 1952 Mad. 117.

[48] Rules of Procedure in Lok Sabha, 229.

House itself or referred to the Committee of Privileges, which has not more than fifteen Members, nominated by the Speaker. The committee, after inquiring into the matter, reports to the Speaker the nature of the breach, if any, and the action recommended. The Speaker may permit half an hour's debate before putting the question to the House. Any Member may move that the House agrees, disagrees with or makes amendments to the recommendation.[88] Similar rules apply in the Rajya Sabha.[89]

An Indian newspaper commented adversely on questions asked in a State Legislature about liquor permits issued to judges. The committee of privileges reported against the editor, who was called to the bar of the House and heard. The House, by a large majority, held that a breach of privilege had been committed; press facilities were withdrawn until the editor furnished an apology in a form approved by the House.[90]

No officer (such as the Speaker, Secretary or sergeant-at-arms) or Member of Parliament in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business or maintaining order is subject to the jurisdiction of any court in respect of the exercise of those powers.[91] The Rules of Procedure confer on the Speaker power to determine finally all points of order and what may be discussed; even if his decision is wrong, the courts cannot interfere.[92] The Speaker of a State Legislature issued a warrant to arrest a journalist for contempt of the House. He was released by the Supreme Court for violation of the Fundamental Right to be produced before a magistrate within twenty-four hours,[93] though the Supreme Court subsequently doubted whether this was correct. The journalist subsequently sued for damages for wrongful arrest. It was held that the Speaker's power to commit and punish for contempt of the House was identical with that of the Speaker of the House of Commons and expressly conferred on him by the Constitution. The warrant could be executed anywhere in India. The privileges and immunities of a House were not subject to the Constitution and could not be cut down by the Fundamental Rights. The Speaker, whether right or wrong, enjoys complete immunity from legal proceedings.[94] So long as the Speaker's action can be related to any of his powers to regulate procedure or conduct business, he is protected, but it might be otherwise if it was a colourable

[88] Rules of Procedure in Lok Sabha, 222–228, 313–316
[89] Council of States Manual, Rules 163–178.
[90] *The Times*, April 16, 1953.
[91] Art. 122 (2).
[92] *Saradhakar* v. *Speaker*, A.I.R. 1952 Orissa 234.
[93] A.I.R. 1953 Journal 62.
[94] *Homi* v. *Shree Nafisul*, I.L.R. 1957 Bom. 218.

pretence of exercising his powers as Speaker.[95] In a celebrated English case,[96] the court refused to interfere with a prima facie breach of the Licensing Act, 1921, by a Committee of the House of Commons in selling liquor. Though it has been held that the immunity extends to all matters incidental to and ancillary to those specifically mentioned,[97] one may doubt whether an Indian court would take the same view of such an activity as the English court took of sale of liquor in breach of the Licensing Act, 1921.

Elections

The Constitution vests the superintendence, direction and control of elections to Parliament and State Legislatures and elections of the President and Vice-President in an Election Commission, consisting of a Chief Election Commissioner and such other Election Commissioners as are appointed by the President. Before elections take place, the President appoints, after consultation with the Election Commission, such Regional Commissioners as are considered necessary. The Chief Election Commissioner cannot be removed except on like grounds and in the same manner as a judge of the Supreme Court.[98] Other Election Commissioners are removable on the recommendation of the Chief Election Commissioner. The Election Commission is responsible for the preparation of electoral rolls, the conduct of elections, the appointment of election tribunals to determine disputes arising out of elections to Parliament and State Legislatures[99] and for furnishing advice on disqualifications, to the President in the case of Members of Parliament[1] and to the Governor in the case of Members of State Legislatures.[2]

Subject to the Constitution, Parliament may by law provide for all matters relating to elections to Parliament and State Legislatures[3]; in so far as provision is not made by Parliament, a State Legislature may provide for elections to the State Legislature.[4]

The Constitution requires seats in the Lok Sabha to be so allotted that the ratio between their number and the population of the State is, as far as practicable, the same for each State and that each State is divided into territorial constituencies so that the ratio between the population of each constituency and the number of seats allotted to it is, as far as practicable, the same throughout the State.[5] After

[95] *Godavaris* v. *Nandakisore*, A.I.R. 1953 Orissa 111.
[96] *R.* v. *Graham-Campbell* [1935] 1 K.B. 594.
[97] *Godavaris* (*supra*).
[98] *See p. 165.*
[99] Art. 324.
[1] Art. 103.
[2] Art. 192.
[3] Art. 327.
[4] Art. 328.
[5] Arts. 81 (1) and 170 (2).

each census, taken every ten years, the allocation of seats in the Lok Sabha and the delimitation of constituencies has to be *readjusted* but not so as to affect representation in the House then in being.[6] The Delimitation (Commission) Act, 1952, empowers the Union Government to set up a commission to determine, on the basis of the census figures, the number of seats to be allotted to each State in the Lok Sabha, the number of seats to be assigned to the Legislative Assembly of each State, to distribute these among territorial constituencies, delimited, as far as possible, so that all constituencies *have one or two Members and consist of compact geographical* areas, having regard to existing boundaries of administrative areas and communications. The commission consists of the Chief Election Commissioner and two other persons, one of whom is chairman, who are or have been judges of the Supreme Court or a High Court, appointed by the Union Government. Members of the Lok Sabha and of the Legislative Assembly in each State are nominated by the Speaker as associates. The commission is invested with the powers of a court. It publishes its proposals in the *Gazettes*, calls for objections, which are heard before the final orders are published in the *Gazette of India*, and have the force of law.

The Constitution provides that every citizen who has attained the age of twenty-one and is not disqualified for non-residence, unsoundness of mind, crime or corrupt or illegal practice is entitled to be registered as a voter.[7] There is one electoral roll for each territorial constituency for each House of Parliament and each State Legislature; no person shall be ineligible for enrolment on grounds of religion, race, caste or sex.[8]

Electoral rolls for each constituency are prepared by an electoral registration officer, an officer of Government or of a local authority designated by the Election Commission in consultation with the State Government. The work is superintended and controlled by a chief electoral officer in each State, an officer of Government, nominated by the Electoral Commission in consultation with the State Government.[9] No person may be registered for more than one constituency; he can only be registered in the constituency within which he is ordinarily resident.[10]

Elections are controlled by the chief electoral officer in the State. A returning officer is appointed for each constituency by the Election Commission in consultation with the State Government.[11] The

[6] Art. 82.
[7] Art. 326.
[8] Art. 325.
[9] Representation of the People Act, 1950, ss. 13A, 13B.
[10] *Ibid.* ss. 17, 19.
[11] Representation of the People Act, 1951, ss. 20, 21.

Election Commission notifies the last day for the nomination of candidates, being the seventh day after the issue of the notification calling for the election, and the day for scrutiny of nominations, being two days later. The returning officer issues a public notice, calling for nominations.[12] Not more than four nomination papers may be presented by a candidate and must be accompanied, at a parliamentary election, by a deposit of Rs. 500, in the case of an election to a State Legislature, Rs. 250; half these sums only are required from candidates from scheduled castes.[13] On the day fixed for scrutiny, each candidate, his election agent, who must not be disqualified for membership of a Legislature, one of his proposers and one other person authorised by him may be present to examine the nomination papers. A candidate may be allowed two days' time to meet any objection made by the returning officer or rival candidate. No nomination paper shall be rejected, except for a substantial defect. The returning officer exhibits a list of validly nominated candidates.[14] No person is qualified to contest an election to the Lok Sabha unless he is an elector for a parliamentary constituency or to the Rajya Sabha, unless he is an elector for a parliamentary constituency in the State concerned. For election to a State Legislature, a candidate must be an elector for an Assembly constituency in that State.[15] A person convicted of bribery, undue influence or personation at an election,[16] promoting enmity on grounds of religion, caste, race, community or language between classes in connection with an election,[17] removal of ballot papers from a polling station,[18] or misconduct while employed on official duty in connection with an election [19] is disqualified from voting or being a Member of a Legislature for six years from the date of his conviction,[20] unless the disqualification is removed by the Election Commission.[21] A person *convicted and sentenced in India for a period of not* less than two years is disqualified for membership of a Legislature for five years after his release, but the period may be reduced by the Election Commission. A person who fails to lodge an account of election expenses is disqualified for three years from the date on which the account should have been rendered, unless the disqualification is removed by the Election Commission. A person having a subsisting

12 *Ibid.* ss. 30, 31.
13 *Ibid.* ss. 33, 34.
14 *Ibid.* s. 36.
15 Representation of the People Act, 1951, ss. 4-6.
16 Penal Code, ss. 171E, 171F.
17 Representation of the People Act, 1951, s. 125.
18 *Ibid.* s. 135.
19 *Ibid.* s. 136 (2) (*a*).
20 *Ibid.* ss. 139, 141.
21 *Ibid.* s. 144.

contract for goods or services with the appropriate government or who is a director, manager or secretary of a corporation in which the appropriate government has not less than 25 per cent. of the capital is disqualified. An ex-government servant dismissed for corruption or disloyalty is disqualified for five years after dismissal.[22]

A candidate may withdraw up to the third day after scrutiny.[23] Immediately after the expiry of that period, the returning officer publishes a list of contesting candidates in alphabetical order.[24] The Election Commission fixes the date by which the election must be completed and the day on which polling must commence, not being earlier than the twentieth day after the date for the withdrawal of candidatures.[25]

The returning officer, with the approval of the Election Commission, arranges for polling stations and publishes a list showing where voters from the different areas have to go.[26] He appoints a presiding officer and polling officers for each polling station: the latter assist the former in keeping order and seeing that the poll is fairly taken.[27] Polling hours are fixed by the Election Commission and must not be less than eight hours in one day.[28] Polling is by ballot; proxies are not allowed, but members of the armed forces, government servants employed outside India, their wives and persons preventively detained may be allowed to vote by post.[29] To avoid personation, persons coming to vote may be required to produce identity cards or submit to being marked with indelible ink.[30] Votes are counted, under the direction of the returning officer in the presence of the candidates, their election agents and counting agents.[31] The returning officer reports the result as soon as possible after it has been declared to the Election Commission and the Secretary of the House to which the successful candidate has been elected.[32]

The Constitution provides that no law delimiting constituencies or allotment of seats shall be called in question in any court and that no election to Parliament or a State Legislature shall be called in question except by election petition to such authority as is provided by law.[33] As the relevant Article commences with the words "Notwithstanding anything in this Constitution . . .", it would

[22] Representation of the People Act, 1951, s. 7.
[23] *Ibid.* s. 30 (c).
[24] *Ibid.* s. 38.
[25] *Ibid.* s. 30.
[26] *Ibid.* s. 25.
[27] *Ibid.* ss. 26, 27, 28.
[28] *Ibid.* s. 56.
[29] *Ibid.* s. 60.
[30] *Ibid.* s. 61.
[31] *Ibid.* s. 64.
[32] *Ibid.* s. 67.
[33] Art. 329.

seem prima facie to exclude the jurisdictions of the Supreme Court to grant special leave to appeal from a decision of an election tribunal[34] and of the High Courts to control such tribunals by certiorari.[35] After the first general election the Supreme Court held that "election" in this context covered the whole process, from notification of the election to the declaration of the result, so that the courts' jurisdiction over any matter arising while the election was in progress, such as the rejection of a nomination paper, was excluded.[36] The Representation of the People Act provides that any candidate or elector can present an election petition to the Election Commission on the grounds that the successful candidate was not qualified or disqualified or that he or his election agent or other person, with the consent of either, had committed a corrupt practice or that a nomination paper had been improperly rejected or that the result of the election had been affected by the improper acceptance of a nomination or by the commission of a corrupt practice in his interest or by the improper reception or rejection of a vote or by non-compliance with the Act or the Constitution.[37] The Act further provided that an election could not be called in question otherwise.[38] The petition, if in conformity with the Act, is referred to an election tribunal, selected from lists of district judges deemed by the High Courts to be fit for this duty,[39] with most of the powers of a civil court, which can dismiss the petition, declare the election void, with or without declaring another candidate elected.[40] There was a heavy file of election petitions after the first general election and the work of the election tribunals was not uniformly good. The Supreme Court decided that Article 329 was no bar to a grant of special leave to appeal from the decision of an election tribunal. The court said as to the right of election, being created by the Constitution, which provided a special remedy for its enforcement, the only forum for an election dispute was the election tribunal and no election could be called in question in a court. But the tribunal was obliged to act judicially and, once it had adjudicated on the matter, there was no objection to the Supreme Court granting special leave to appeal.[41] It was subsequently held that High Courts had jurisdiction over election tribunals by writ.[42] While possibly not concurring with the

[34] Art. 136.
[35] Art. 226.
[36] *Ponnuswami* v. *Returning Officer*, A.I.R. 1952 S.C. 64.
[37] Representation of the People Act, 1951, ss. 81, 100.
[38] *Ibid.* s. 80.
[39] *Ibid.* s. 86.
[40] *Ibid.* s. 98.
[41] *Durga Shankar* v. *Raghuraj*, A.I.R. 1954, S.C. 520.
[42] *Hari Vishnu* v. *Ahmad Ishaq*, A.I.R. 1955 S.C. 233.

reasons given by the Supreme Court, the Union Government sponsored legislation to repeal the section in the Act of 1951 giving finality to the decision of an election tribunal and inserting provisions for an appeal to the High Court, making its judgment conclusive,[43] but it has been held that the High Court, in exercising this jurisdiction, is not *persona designata*, but a civil court and so subject to the appellate jurisdiction of the Supreme Court.[44]

The Act of 1951 has been subjected to ten amendments, some of which appear to depart from the objects of the Act, as originally enacted, to penalise heavily activities calculated to prejudice the purity of elections, and this notwithstanding reflections by the courts and recommendations of the Election Commission. The provisions for disqualification for being guilty of an illegal practice have been repealed. The exercise of undue influence, the publication of false statements regarding the personal character of another candidate and the provision of conveyances for voters are only corrupt practices if done by the candidate or his election agent or some other person with the consent of either. A candidate incurs no penalty by using village revenue officials as his agents.[45] The way is laid open for a powerful political caucus to exercise with impunity physical and other kinds of pressure on voters in support of its own candidates. Permission to the party in power to exert pressure on villagers through the village revenue officials is a powerful instrument for ensuring its hold on the sceptre.

[43] Representation of the People Act, 1951, ss. 116A, 116B.
[44] *Sharma Devi* v. *Mangel Sain*, A.I.R. 1961 S.C. 58.
[45] Representation of the People Act, 1951, s. 123, as amended.

CHAPTER 9

THE CONSTITUTIONS OF THE UNITS

Assimilation of the Constitution of the Units

In the U.S.A., Canada and Australia the federal Constitution was to operate on units, each of which had previously led a separate existence, so that it was only essential to define the Constitution and powers of the new federal government and the distribution of sovereignty between it and the pre-existing units. In British India constitutional development began with delegation and continued with a transfer of power from a pre-existing Central Government but, in Princely India, the Princes were reduced from a situation in which they negotiated as equals with the Central Government to a position in which they enjoyed only such rights as the Centre would concede, though in practice they enjoyed so wide a discretion in internal affairs that the true position was obscured. After the passing of the Independence Act, Princes who endeavoured to assert their political independence found it only a phantom. The Centre could do as it wished and what it wished was the highest possible degree of uniformity in democratic political institutions throughout India.

The Constitution of the U.S.A. is silent on the subject of State constitutions, apart from saying that the Centre shall guarantee to *every State a republican form of government. The Indian Constitu*tion, as originally enacted, dealt as fully with the constitutions of the Part A and Part B States as with the constitution of the Union and the powers of the States to change their constitutions were almost negligible. As the Act of 1935 transferred powers from the Centre to the Provinces and was the Act of a Legislature politically superior to Indian Legislatures, it was probably essential to deal fully and uniformly with provincial constitutions, but a Princely State was to enter the Federation on terms agreed and on the understanding that the existing political structure in the State would not be disturbed further than the Act and the Instrument of Accession demanded. The Constituent Assembly might have conceded to the prospective units of the Union a limited right to define their own constitutions, but it did not. The political units existing at the time of independence *were not regarded as having any abiding personality. The Constitu*tion in its original form not only prescribed almost identical institutions for all States of each class but allowed very few differences between the two classes. With the abolition of the Part B

States in 1956, an even higher degree of uniformity has been achieved. The pattern already examined in the structure of the Union machinery of government is, as far as possible, reproduced in the structure of the State machine, so that the discussion of the State Executive and Legislature which follows will mainly be restricted to indicating differences from the Union Executive and Parliament.

The State Executive

Corresponding to the President as head of the Union, the Governor is head of the State but the same person may be head of more than one State.[1] The Governor is appointed by the President[2]: he holds office at the pleasure of the President, normally for a term of five years.[3] He must be an Indian citizen and thirty-five years of age[4]; he must not hold any other office of profit; if he is a Member of any Legislature, he vacates his seat on entering on his office.[5]

The Governor's power to pardon, commute and suspend sentences covers offences against laws on the State List and laws on the Concurrent List, unless the Executive power of the State has been excluded by Parliamentary law. Only the President may pardon a person condemned to death but the Governor may suspend, remit or commute the sentence.[6]

The Governor is consulted on the appointment of judges of the High Court.[7] He appoints, as Advocate-General, a person qualified for appointment as judge of a High Court; the Advocate-General's tenure and functions are, within the State, similar to those of the Attorney-General in the Union.[8] The Governor appoints the members of the State Public Service Commission.[9]

The relationship between the Governor and his Ministers is the same as that between the President and his Ministers, except that it is explicitly stated that the Governor will be advised by his Ministers except in so far as he is required, by or under the Constitution, to exercise his functions in his discretion, and it is for him to decide when a matter is to be dealt with in his discretion.[10] These references to the Governor's discretion recall provisions in the Act of 1935 but lack the precision there displayed. The only instance in the Constitution of a Governor being specifically required to act in his discretion relates to the responsibility of the Governor of Assam for the administration of certain tribal areas until the President otherwise directs.[11] No doubt legislation could specify other matters to be

[1] Art. 153.
[2] Art. 155.
[3] Art. 156.
[4] Art. 157.
[5] Art. 158.
[6] Art. 161
[7] Art. 217 (1).
[8] Art. 165.
[9] Art. 316 (1).
[10] Art. 163.
[11] Sched. 6, para. 18.

dealt with in the Governor's discretion. A Governor would presumably act on the advice of Ministers in such cases as the President does, but it would seem that in the choice of the Chief Minister of the State,[12] in reserving Bills for the consideration of the President[13] and reporting to the President that a situation has arisen in which the government of the State cannot be carried on in accordance with the Constitution,[14] he must normally act in his discretion.

The Governor's relations with the State Legislature are analogous to those between the President and Parliament. If there is an upper Chamber, he nominates one-sixth of its members, being persons eminent in learning, co-operative movement or social service.[15] He summons and prorogues the State Legislature; he dissolves the Legislative Assembly.[16] He has rights like the President to address and send messages to the Legislature[17] and to assent to, veto or return Bills for reconsideration; he may also reserve Bills for the President's consideration and he must reserve a Bill which he thinks calculated to endanger the constitutional position of the High Court.[18] He has powers and responsibilities similar to the President's in relation to the financial business of the Legislature.[19]

He may legislate by Ordinance when the State Legislature or both Houses, if there are two, are not in session but only on matters within the legislative competence of the State Legislature. If a contemplated Ordinance deals with a matter which could not be introduced in the form of a Bill in the Legislature without the President's sanction (*e.g.*, an Ordinance imposing restrictions on freedom of trade with or within the State) or if he would have reserved a Bill dealing with the same matter (*e.g.*, an Ordinance authorising the acquisition of property for the use of a State corporation) or if the subject-matter is an item on the Concurrent List and there are provisions which, in a Bill which had not received the President's assent, would be void for repugnancy to a Parliamentary law, the Governor must obtain the President's instructions before making the Ordinance.[20]

The Governor enjoys a similar immunity to the President.[21] *Mutatis mutandis* the provisions applicable to the authentication of official acts of the President apply also to the Governor.[22]

The constitutional provisions regarding the Union Ministers which have been discussed in Chapter 7 are, with necessary modifications, repeated in relation to the State Ministers, but the conventional

[12] Art. 164.
[13] Art. 200.
[14] Art. 356.
[15] Art. 171 (5).
[16] Art. 174.
[17] Arts. 175, 176.
[18] Art. 200.
[19] Arts. 202, 203, 205, 207.
[20] Art. 213.
[21] Art. 361.
[22] Arts. 166, 299.

developments at the Centre have not necessarily been followed in the States. It has, for instance, been held that the Governor may appoint as Chief Minister a nominated member of the Legislative Council.[23] The Constitution explicitly requires that in Bihar, Madhya Pradesh and Orissa there must be a Minister in charge of tribal welfare.[24]

The State Legislatures

Andhra Pradesh, Bihar, Madhya Pradesh, Madras, Maharastra, Mysore, Punjab, U.P. West Bengal have bicameral Legislatures; each of the other States, except Kashmir, has a Legislature with only one House. Where there are two Houses, the upper House is called the Legislative Council; the lower or only Chamber is called the Legislative Assembly.[25] It is only in regard to the second Chamber that a State can take the initiative in amending the Constitution. A Legislative Assembly may pass a resolution, supported by a majority of its total membership and two-thirds of those present and voting, to abolish the Legislative Council if it has one or create one if it has not. Parliament may then pass an Act to give effect to the resolution, and the special procedure for an amendment of the Constitution is not required.[26]

The members of the Legislative Council must not be less than forty; subject thereto they must not exceed one-third of the total number of members of the Legislative Assembly.[27] The total varies from 108 in Uttar Pradesh to forty-eight in Madras.[28] Parliament may provide for the composition of the Legislative Councils but has not done so, with the result that what was originally regarded as an experimental method, laid down in the Constitution, still applies. One-third of the members are elected by local government boards, one-twelfth by university graduates, one-twelfth by teachers in secondary schools and places of higher education; these are elected in territorial constituencies. One-third are elected by the Legislative Assembly. All elections are by proportional representation with the single transferable vote. The remainder are nominated by the Governor.[29]

The Legislative Assembly must have not less than sixty nor more than 500 members; the numbers vary from 430 in Uttar Pradesh to 105 in Assam.[30] These are chosen by direct election in territorial

[23] *In re Ramamoorthi*, A.I.R. 1953 Mad. 94.
[24] Art. 164 (1), Proviso.
[25] Art. 168.
[26] Art. 169.
[27] Art. 171 (1).
[28] *Representation of the People Act, 1950*, Sched. 3.
[29] Art. 171 (2) and (3).
[30] Representation of the People Act, 1950, Sched. 2.

constituencies, readjusted after each census so as to maintain a uniform ratio between the population of a constituency and the number of its representatives.[31]

Members of the State Legislatures must be citizens of India; members of Legislative Councils must be at least thirty and members of Legislative Assemblies twenty-five.[32]

The provisions of the Constitution relating to the Speaker or chairman, conduct of business, financial business, the right to regulate procedure, privileges in Parliament, considered in Chapter 8, are substantially reproduced with necessary adaptation in the provisions of the Constitution applicable to the State Legislatures.[33] Only differences of importance can be mentioned here.

Whereas Parliament may, during the continuance of a Proclamation of Emergency, prolong the term of the House of the People,[34] an Act of Parliament is necessary to extend the term of a Legislative Assembly beyond the normal five years, and such an extension cannot go beyond six months after the Proclamation has ceased to operate.[35]

Whereas in case of deadlock between the two Houses of Parliament the device of a joint session, borrowed from Australia, applies, in the case of a deadlock in a bicameral State Legislature, the principle in the (British) Parliament Act, 1911, has been adopted, the delaying power of the second Chamber being considerably reduced. If a Bill passed by the Legislative Assembly is rejected by the Legislative Council or if more than three months elapse without the Bill being passed or if the Legislative Council makes amendments to which the Legislative Assembly does not agree, the Legislative Assembly may pass the Bill again, in the same or a later session and return it to the Legislative Council. If that Chamber again rejects the Bill or passes it with unacceptable amendments or if more than one month elapses without the Bill being passed, it is deemed to have been passed by both Houses.[36]

If a Bill is reserved for the consideration of the President, he may assent to, or veto it; he may also return a State Bill, other than a money Bill, with suggested amendments. In such a case the State Legislature cannot override the President's power of veto as it can the Governor's; it must reconsider the Bill within six months and the Bill must again be presented to the President.[37]

[31] Art. 170.
[32] Art. 173.
[33] Arts. 178–212.
[34] Art. 83 (2).
[35] Art. 172.
[36] Art. 197.
[37] Art. 201.

Kashmir: the Anomalous State

The State of Jammu and Kashmir stands in a different relationship to the Union from the other States and enjoys a higher degree of autonomy. The reasons for this are mainly historical.

In 1834, Gulab Singh, the Sikh sardar of Jammu, conquered Ladakh. In the war between the East India Company and the Sikhs in 1845 and afterwards he rendered valuable services to the Company. It seemed expedient to establish a rival power on the Sikh flank so, in 1846, Kashmir was sold to Gulab Singh for seventy-five lakhs of rupees. This created the new State of Jammu and Kashmir with a predominantly Muslim population, governed by a Hindu dynasty with the aid of foreign officials. In 1932 a Muslim Conference was founded; in 1938 it became the National Conference and steadfastly agitated for representative government. In 1939 the Maharaja promulgated a constitution which, with amendments, subsisted until the promulgation of the present Constitution in 1956. Though it provided for a Cabinet, the Ministers were responsible to the Maharaja; the Legislature was partly elected but *it was specifically declared that all sovereignty resided* with the Maharaja. In 1944 he yielded to popular clamour to the extent of appointing a nominee of the Conference as one of the Ministers, but in 1944 that Minister resigned, and the Conference commenced an agitation to expel the dynasty from Kashmir. The Conference leader, Sheikh Abdulla, was tried and convicted of sedition.

When independence came the Maharaja acceded to neither of the two new dominions but offered to enter into standstill agreements with both. Pakistan accepted but India suggested further negotiations; Pakistan regarded this as indicating an acquisitive attitude and offered to protect the Maharaja from his insurgent subjects if he would accede to Pakistan. The Maharaja procrastinated and in October 1947 tribesmen, with Pakistan aid, started a revolt too formidable for the Maharaja to contain. He then signed an instrument of accession to India and requested military aid. The aid was furnished and the insurrection halted; the accession instrument was also accepted though the Governor-General said that his Government hoped that the question of the State's accession would be settled by a referendum. Pakistan refused to recognise the accession and a cease-fire agreement left part of the State under Pakistan control.

Other Princes had signed instruments of assession similar to that signed by the Maharaja. Some of these were induced to surrender *all* political power and suffer their States to be integrated into other Provinces or States. The others sent representatives to the Constituent Assembly, became bound by its decisions and by the

Constitution evolved. This provided for the internal government of their States and for its own amendment so that, by 1956, all States other than Kashmir had almost identical internal constitutions and relations with the Union, prescribed by the Constitution. The instrument signed by the Maharaja, while relinquishing power over foreign affairs, the armed forces and communications, reserved all other attributes of sovereignty. The Kashmir Government would yield no more and the Union was not anxious to exert the pressure it had applied to other Princely States.

In 1948 the Maharaja, unwillingly yielding to Conference pressure, issued a proclamation making Sheikh Abdulla, who for some time had been emergency head of the administration, Prime Minister in a Cabinet jointly responsible to the Maharaja and the Legislature, and announcing the constitution of a National Assembly to frame a popular Constitution. Even this did not satisfy the Conference, and in 1949 the Maharaja "temporarily" withdrew from the State, after delegating his powers to his son, the Yuvraj Karan Singh. By this time the Indian Constituent Assembly was approaching the end of its labours but no Kashmir representatives were appointed until June 1949. It was ultimately decided that the part of the Constitution dealing with the Princely States [38] should not apply to Kashmir and that the rest of the Constitution should apply with such omissions and amendments as were notified by the President, after consultation with the Kashmir Government. Kashmir should summon its own Constituent Assembly to frame its internal Constitution. The Yuvraj issued a proclamation in November 1949 declaring that all other constitutional documents defining the relations between India and Kashmir would be superseded by the Indian Constitution.

The President issued the Constitution (Application to Jammu and Kashmir) Order, 1950. The provisions of the Constitution relating to admission and formation of New States,[39] citizenship,[40] Fundamental Rights,[41] Directive Principles,[42] the States,[43] the Scheduled Areas,[44] inter-State trade,[45] the public services,[46] and the emergency provisions,[47] were not to apply to Kashmir. The other parts of the Constitution would apply subject to modifications, of which only the more important can be mentioned here. The jurisdiction of the Supreme Court in Kashmir was restricted to its original jurisdiction in disputes

[38] Part 7.
[39] Part 1, less Art. 1, which deals with the name and territory of the Union.
[40] Part 2.
[41] Part 3.
[42] Part 4.
[43] Part 6.
[44] Part 10.
[45] Part 13.
[46] Part 14.
[47] Part 18.

between the Union and a State or between States,[48] and to constitutional appeals.[49] Kashmir's representatives in Parliament were to be appointed by the President in consultation with the Kashmir Government. The Union had no power to give directions to the State as to how its Executive power was to be exercised. The Legislative and Executive power of the Union in Kashmir was restricted to those items on the Union Legislative List which were agreed to be covered by the surrendered powers over foreign affairs, armed forces and communications. Legislative and Executive power over all other matters lay with the State.

It was not until 1951 that the Yuvraj issued a proclamation summoning the Constituent Assembly, composed of members *directly* elected by adult Kashmiris from single-member constituencies of 40,000 souls. It first met in August and after some consideration decided that an elected head of the State, styled the Sardar-i-Riyasat, should replace the hereditary dynasty, and the Constitution should be democratic. In further negotiations between Kashmir and the Union, these two points were accepted by India; the Sardar-i-Riyasat should be elected by the State Legislature, but recognition by the President would be necessary and he would hold office at the pleasure of the President. But the position regarding citizenship was complicated by the fact that, in an attempt to appease popular resentment, the Maharaja had issued a Notification in 1927 defining classes of State subjects and granting them privileges; class 1 were persons settled in the State before 1885 and their issue who had since permanently resided in the State; class 2 were persons settled before 1911, who had permanently resided in the State and acquired property; class 3 were permanent residents who had acquired immovables; in regards to scholarships, grants of State land and appointments in the public service, class 1 was preferred to class 2, which was preferred to class 3. Despite the emphasis in the Indian Constitution on equality, it was impossible to ignore the reluctance of the politically conscious Kashmiris to surrender any of these rights, so it was agreed that persons domiciled in the State should be Indian citizens and the State should retain the power to accord special rights to State subjects, thenceforth to be designated as "permanent residents." It was agreed that the power of the President to proclaim a general emergency[50] should extend to Kashmir but, if the occasion for its exercise was an internal disturbance, the concurrence of the State Government should be secured. These and other points were embodied in the Delhi Agreement of 1952, which was ratified by the Indian Parliament and the Kashmir Legislature.

[48] Art. 131.
[49] Art. 132.
[50] Art. 352.

The President, in consultation with the State Government, then issued the Constitution (Application to Jammu and Kashmir) Order, 1954, to implement the agreement and supersede the Order of 1950. The result is that the Indian Constitution, as modified by the Order of 1954, deals with the powers of the Union in Kashmir and the relations between the Union and Kashmir but does not touch the internal constitution of the State. Those parts of the Constitution which deal with the internal constitutions of the other Indian States[11] do not apply. The rest of the Constitution applies, subject to modifications and amendments, of which it is only possible to mention the more important. In the Part dealing with the Union and its territory,[12] it is provided that no Bill to alter the area, boundaries or name of the State shall be introduced in Parliament without the consent of the Kashmir Legislature. In the Part dealing with citizenship,[13] it is provided that a permanent resident of the State, who, after migrating to Pakistan, returns to the State under a resettlement permit or under authority of State law, shall be deemed to be an Indian citizen. The Directive Principles do not apply and the Fundamental Rights only apply in Kashmir as from May 14, 1954, and subject to modifications. No Kashmir law declaring any class of persons "permanent residents" or conferring special rights on them can be avoided for repugnancy to a Fundamental Right. For ten years restrictions on the seven democratic freedoms need only be reasonable in the eyes of the enacting Legislature and they may all be restricted in the interest of State security. It is the State Legislature, not Parliament, that lays down the maximum period for preventive detention and for detention without recourse to an advisory board.

The representatives of the State in the Lok Sabha are appointed by the President on the recommendation of the State Legislature. For the purpose of assigning votes to the Kashmir representatives in the electoral college which elects the President, the population of Kashmir is deemed to be 4,410,000.

Though the original jurisdiction of the Supreme Court and its appellate jurisdiction in constitutional, civil and criminal cases is the same as in other States, it has no power to grant special leave to appeal. The Comptroller-General exercises no powers in Kashmir.

In the Part dealing with distribution of powers and relations between the Union and the States,[14] Parliament is given power to

[11] Parts 6–10.
[12] Part 1.
[13] Part 2.
[14] Part 11.

legislate for the State on all matters on the Union List, subject to minor modifications but legislative power on all other matters is with the State. The power of Parliament to legislate on a State subject by virtue of a resolution of the Council of States[55] does not extend to Kashmir. Parliament's power to legislate to implement an international agreement[56] is subject to the proviso that no disposition of the State shall be made without the consent of its Government. In any case of repugnancy between a Parliamentary law and a State law, the former prevails.

Except that the Election Commission superintends and controls elections to Parliament and to the offices of President and Vice-President, the Part relating to elections[57] does not apply in Kashmir. In the Part dealing with emergency provisions,[58] the power of the President to suspend the State Constitution for failure of the constitutional machinery[59] is excluded and the President cannot proclaim a financial emergency in Kashmir.[60] Though he can proclaim a general emergency when faced with a threat of war, he cannot do it to meet a threat of internal disturbance without the concurrence of the State Government.[61] No amendment of the Indian Constitution will affect Kashmir unless applied by order of the President after consultation with the State Government.

The internal Constitution of Kashmir was approved by the Constituent Assembly in November 1956 and came into force on January 26, 1957. It defines the territory of the State as that under the Maharaja's sovereignty on August 15, 1947,[62] and prohibits any amendment affecting the accession to India or the provisions of the Indian Constitution applicable to the State.[63]

Every person who has the status of citizen under the Indian Constitution is a permanent resident if, on May 14, 1954, he was a State subject, class 1 or 2, or had acquired immovable property and been ordinarily resident in the State for not less than ten years. If before that date he was a State subject, class 1 or 2, but, having migrated to Pakistan before March 1, 1947, he subsequently returned under a resettlement permit or any State law, he will be a permanent resident.[64]

Kashmir has its own directive principles. The prime object of

[55] Art. 249.
[56] Art. 253.
[57] Part 15.
[58] Part 18.
[59] Art. 356.
[60] Art. 360.
[61] Art. 352.
[62] Constitution of Jammu and Kashmir, Art. 4.
[63] *Ibid.* Art. 147.
[64] *Ibid.* Art. 6.

the State is to establish a socialist order[65]; development of the economy of the State is to be planned and activities assigned to the public, co-operative and private sectors,[66] the standard of living of the rural masses is to be speedily improved[67]; village panchayats are to be organised as units of self-government[68]; local crafts and cottage industries are to be modernised and developed[69]; the judiciary is to be separated from the Executive[70]; permanent residents shall enjoy the *right to work, freedom from exploitation, reasonable leisure and* public assistance when necessary[71]; permanent residents shall receive free education up to university standard; education up to fourteen will be compulsory and adult education will be made available to workers[72]; women will receive equal pay for equal work and reasonable maintenance when divorced or abandoned[73]; special care will be taken of backward classes[74]; public health will be improved[75]; equality and secularism will be fostered.[76]

The Kashmir Constitution is, to a considerable extent, adapted from those parts of the Indian Constitution applicable to internal government of the States, so the remainder of this account of the Kashmir Constitution will be confined to indicating the significant points of difference between Kashmir and the other Indian States in this respect.

The Sardar-i-riyasat is elected by the State Legislature; the method is similar to that used for the election of the President but he cannot enter on his office unless recognised by the President. A candidate must be a permanent resident and not under twenty-five.[77] He holds office at the pleasure of the President and normally holds office for five years.[78] He can be removed on a resolution supported by two-thirds of the total membership of the Legislative Assembly.[79] A vacancy in the office can be filled by a *locum tenens* appointed by the President on the recommendation of the Ministry.[80] The Sardar-i-riyasat is explicitly obliged to act on the advice of his Ministers, except when selecting the Prime Minister, appointing deputy Ministers and suspending the Constitution.[81] He may, with the concurrence of the President, for six months assume the executive and legislative powers of the State, if satisfied that government cannot be carried on in accordance with the Constitution.[82] Whereas in other

[65] *Ibid.* Art. 13.
[66] *Ibid.* Art. 14.
[67] *Ibid.* Art. 15.
[68] *Ibid.* Art. 16.
[69] *Ibid.* Art. 17.
[70] *Ibid.* Art. 18.
[71] *Ibid.* Art. 19.
[72] *Ibid.* Art. 20.
[73] *Ibid.* Art. 22.
[74] *Ibid.* Art. 23.
[75] *Ibid.* Art. 24.
[76] *Ibid.* Art. 25.
[77] *Ibid.* Art. 27 and Sched. 1.
[78] *Ibid.* Art. 28.
[79] *Ibid.* Art. 32.
[80] *Ibid.* Art. 33.
[81] *Ibid.* Art. 35 (2).
[82] *Ibid.* Art. 42.

Indian States, the head of the Ministry is called the Chief Minister, in Kashmir he is called the Prime Minister.

The State Legislature is bicameral; the Legislative Assembly consists of 100 members elected from territorial constituencies; at present twenty-five such seats are not filled, as they represent the territory under Pakistan control. If he thinks women are inadequately represented, the Sardar-i-riyasat may nominate two women members[63]; a candidate for election must be a permanent resident.[64] The Legislative Council has thirty-six members; eleven each from the Provinces of Jammu and Kashmir are elected by the Legislative Assembly; municipal bodies in Kashmir, municipal bodies in Jammu, teachers in Kashmir and teachers in Jammu each elect one member; panchayats in each Province elect two members; the Sardar-i-riyasat nominates three from backward classes and three from persons proficient in learning, co-operative movement and social service.[65] Questions of disqualification of members are determined by the High Court.[66]

The High Court consists of a Chief Justice and two or more puisne judges[67] now appointed by the President. It sits at Jammu or Srinagar.[68] It has both original and appellate jurisdiction. A judge may be removed by the President on presentation of an *address* supported by a majority of the total membership of each House of the State Legislature and two-thirds of those present and voting.[69]

The Territories

There is no distribution of powers between the Union and the Territories. Parliament may make laws on any matter for any part of India not included in a State.[70] The President may make laws for the Andaman and Nicobar Islands and the Laccadive, Minicoy and Amindivi Islands and may repeal or amend any Act of Parliament applicable to them.[71] Subject to any law made by Parliament, the Territories are administered as the President thinks fit by an Administrator appointed by him, who may be the Governor of an adjacent State who, in that capacity, acts independently of *his* Ministers.[72] A High Court in a State previously exercising jurisdiction in a Territory continues to do so, subject to Parliament's powers to exclude it, to constitute a High Court for the territory and to declare a court in the territory to be a High Court for prescribed purposes.[73]

63 *Ibid.* Arts. 47, 48.
64 *Ibid.* Art. 51.
65 *Ibid.* Art. 50.
66 *Ibid.* Art. 70.
67 *Ibid.* Art. 93.
68 *Ibid.* Art. 101.
69 *Ibid.* Art. 99.
70 Art. 246 (3)
71 Art. 240.
72 Art. 239.
73 Art. 241.

The Government of Union Territories Act, 1963, provides for the establishment in each territory of a Legislative Assembly with thirty members, except Himachal Pradesh, which will have forty. The normal term of the Assembly is five years. It may legislate on any matter in the State or Concurrent Lists, but its legislation must always give way when there is repugnancy to Union legislation. There will be a Council of Ministers to advise the Administrator who may, however, take such measures as he thinks fit with regard to security and the borders of the territory. Any difference of opinion between the Administration and the Ministers will be referred to the President, who may suspend the operation of the Act, if there has been a breakdown of the constitutional machinery or when it is otherwise necessary for the proper administration of the territory.

Special Areas and People

In many parts of India there are communities whose economic, social or intellectual status falls below that of the average Indian citizen and it has long been thought necessary to make special provisions for backward areas and backward classes, partly because the laws generally applicable throughout India assume the existence of an economic and intellectual standard higher than such people possess and partly to protect them from exploitation by more sophisticated citizens. The President, in consultation with the Governor, when it applies to a State, may notify specified communities as Scheduled Tribes and such a notification may only be amended by Parliament.[94] The President may also declare specified areas to be Scheduled Areas and that such areas shall cease to be Scheduled Areas.[95] In States with Scheduled Areas and, if the President directs, in States with Scheduled Tribes but no Scheduled Areas, there is a Tribal Advisory Council of twenty, of whom three-fourths, if possible, are representatives of the Scheduled Tribes in the Legislative Assembly; the function of the Council is to advise on matters affecting the welfare and advancement of the Tribes referred to it by the Governor.[96] The Governor may direct that any statute shall not apply in a Scheduled Area or shall apply subject to exceptions and modifications. He may also, after consulting the Council and with the assent of the President, legislate by Regulation for a Scheduled Area.[97] These provisions can be amended by Parliament

[94] Art. 342. See Constitution (Scheduled Tribes) Order, 1950, and Constitution (Scheduled Tribes) (Part C States) Order, 1951, as amended by Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1956.

[95] Sched. 5, para. 6. See Scheduled Areas (Part A States) Order, 1950, Scheduled Areas (Part B States) Order, 1950, Madras Scheduled Areas (Cesser) Order, 1951, and Andhra Scheduled Areas (Cesser) Order, 1953.

[96] Sched. 5, para. 4

[97] Sched. 5, para. 5.

without recourse to the *special procedure* for amendment of the Constitution.[98] More elaborate provisions apply to the tribal areas in Assam which are divided into two categories. Part A areas are divided into Districts and Regions, governed by elected Councils, with power to legislate, subject to the Governor's veto, on matters of local interest, to raise revenue and establish courts. Acts of the Assam Legislature on matters within the legislative competence of the Councils or restricting consumption of liquor do not apply except to the extent directed by the Councils and the Government may direct that any other legislation shall not apply or apply subject to exceptions and modifications. The Part B areas are governed, as though they were a territory, by the Governor as agent of the President but the Governor may, with the assent of the President, apply any of the provisions applicable to the Part A areas to any Part B area. These provisions can be amended by ordinary Act of Parliament.[99]

The President may repeal any existing law or declare that any law shall not apply or apply subject to modifications or exceptions in any major port (*e.g.*, Bombay, Calcutta, Cochin and Madras) or aerodrome.[1]

[98] Sched. 5, para. 7 (2).
[99] Sched. 6, para. 21.
[1] Art. 364.

CHAPTER 10

THE JUDICATURE

Distribution of Judicial Powers

In a federation, the executive and legislative powers are divided between the centre and the units; generally the centre and each unit, within its own sphere, exercises these powers through its own independent organs. Constitution-makers have, nevertheless, to face the problem whether the same principle is to be extended to the judiciary; is there to be one set of courts to interpret and apply the law of the centre and another to administer the law of the units?

It would seem that, in practice, division of judicial powers cannot be pushed to the same length as division of executive and legislative powers. The U.S.A. has a hierarchy of federal courts but each State has a system of State courts. The federal courts have exclusive jurisdiction in certain matters but some federal matters have been assigned by Congress to the exclusive jurisdiction of State courts and in other matters the federal courts and the State courts have concurrent jurisdiction, with the right of transfer to a federal court. Even in a country where separation of powers has the sanctity of a dogma, the federal and State systems to some extent overlap. Under the Australian Constitution, the establishment of a dual system of courts is possible but the Australian Parliament has generally preferred to invest State courts with jurisdiction in matters within the judicial power of the Commonwealth.

In India, when the Constitution came into force, the High Courts had a comprehensive jurisdiction, applying and interpreting all laws, including Imperial, Central and Provincial statutes. The need of an authority to reconcile their conflicting decisions on matters of general law was, to a limited extent, supplied by the Judicial Committee of the Privy Council. Though the jurisdiction of the Federal Court set up under the Government of India Act, 1935, was limited, it was not restricted exclusively to constitutional points and the Act provided that the law laid down by the Federal Court was binding on all courts in India. The abolition of the appellate jurisdiction of the Privy Council necessitated its transfer to the Federal Court. The Constituent Assembly was faced with two alternatives: to accept the existing system and make only essential modifications or to push the principle of separation of powers to such lengths as would cause grave inconvenience. The Assembly chose the former course.

The Constitution empowers Indian Legislatures to make laws on the jurisdiction and powers of all courts, other than the *Supreme* Court, in relation to matters within their legislative competence,[1] but these powers have not been used to disturb the existing structure and could not be used to diminish the powers of the Supreme Court. In fact the Constitution seems to contemplate enhancement of the *existing powers of the Supreme Court; Parliament may give it further* jurisdiction and powers with respect to matters on the Union List and on any other matter agreed between the Union and a State Government within that State.[2] Parliament may grant supplementary powers to enable the Supreme Court to exercise more effectively its existing jurisdiction[3] and empower it to issue writs for any purpose other than the protection of the Fundamental Rights.[4] By putting the provisions relating to the Supreme Court in a chapter entitled "*The Union Judiciary*" *at the end of Part 5, dealing with* the Union, and those relating to the High Courts at the end of Part 6, dealing with the States, the draftsmen of the Constitution may have misled the reader into thinking that there has been distribution of judicial power, whereas the Indian judiciary is a single pyramid; there is but one system of courts. Though individual statutes may have only local application, questions of constitutional law and general law may be raised in any court. The Supreme Court lays down not only the law of the Constitution but also the general law. The proximity of the Supreme Court has resulted in far more general judicial business coming before the Supreme Court than ever came before the *Privy Council. In all branches of the law there are differences* of opinion among the High Courts and the necessity of a tribunal to decide between the conflicting views is obvious. Informed Indian opinion favours uniformity and certainty whenever possible. Notwithstanding the increase in the number of judges, the ruling of the Supreme Court is anxiously awaited on many points in the Hindu Code enacted in 1956.

The Supreme Court: Its Composition

At the apex of the Indian judicature is the Supreme Court, consisting of the Chief Justice of India and other judges; originally the Constitution provided for seven and empowered Parliament to add to the number.[5] The number was increased to ten and later to thirteen.[6] The judges are appointed by the President, who, before

[1] Sched. 7, List 1, item 95; List 2, item 65; List 3, item 46.
[2] Art. 138.
[3] Art. 140.
[4] Art. 139.
[5] Art. 124 (1).
[6] Supreme Court (Number of Judges) Acts, 1956, 1960.

appointing the Chief Justice, consults such judges of the Supreme Court and the High Courts as he thinks necessary; before appointing puisne judges he is obliged to consult the Chief Justice of India.[7]

A candidate for appointment must have been a judge of one or more High Courts for five successive years or an advocate of one or more High Courts for ten successive years or a distinguished jurist[8]; up to the present appointments have been confined to the first and second classes.

A judge holds office until he attains the age of sixty-five,[9] but he may, if he consents, on the invitation of the Chief Justice; with the consent of the President, act as a judge of the Supreme Court after retirement.[10] He may resign and he may be removed for misbehaviour or incapacity on presentation to the President of an address supported by a majority of the total membership of each House of Parliament and by two-thirds of those voting.[11] No person who has been a Supreme Court judge may plead or act before any court or authority in India.[12] If it is necessary to provide a quorum or continue a session, the Chief Justice may, with the consent of the President and after consulting the Chief Justice of the High Court concerned, require a High Court judge qualified for appointment to the court to act as an *ad hoc* judge.[13] The court normally sits at Delhi but the Chief Justice, with the approval of the President, may appoint other places.[14]

The Supreme Court is a court of record with power to punish for contempt of itself.[15] A court of record is a court, the records of the proceedings of which are accepted without question and which has power to punish for contempt. Contempt may be civil, *i.e.*, disobedience of the orders of the court, or it may be criminal. What amounts to criminal contempt is within the discretion of the court but the discretion must be exercised judicially, *i.e.*, in accordance with principles previously laid down. Deliberate interruption or insult to the court while sitting is criminal contempt and so is conduct tending to bring the administration of justice into contempt or to interfere with the due administration of justice. Defamation of a judge is not contempt unless it tends to impair public confidence in the court. It is not contempt to say that a judge does not state facts correctly when passing orders and is discourteous to the litigants and the bar,[16] but to impute corruption to a judge is.[17] The police were investigating a case of suspected rape and murder: the suspect's servant's

[7] Art. 124 (2).
[8] Art. 124 (3)
[9] Art. 124 (2).
[10] Art. 128.
[11] Art. 124 (4).
[12] Art. 124 (7)
[13] Art. 127.
[14] Art. 130.
[15] Art. 129.
[16] *Brahma Prakash* v. *U.P.*, A.I.R. 1954 S.C. 10.
[17] *Hira Lal* v. *U.P.*, A.I.R. 1954 S.C. 743.

statement was recorded by a magistrate [18] at the request of the police in the hope of binding him to it. The statement was published in a newspaper and the editor and publisher were held in contempt notwithstanding that no date for trial had been fixed. It was held *immaterial whether the statement was true or false*, whether the publication was in good faith or malicious, whether or not the trial had been impeded, whether or not the attention of the authorities or the public had been aroused. It was *sufficient* that the *publication* was calculated to interfere with the course of justice.[19] Once a case has been decided, bona fide criticism amounting to disapproval may be freely expressed but not scurrilous or disrespectful attacks on the court or imputations of incompetence or corruption, because they tend to impair public confidence in the fairness of trials. A newspaper, commenting on a decision that advocates of the Supreme Court were entitled to practice on the original sides of the Bombay and Calcutta High Courts, without being briefed by attorneys, as the rules of those courts required, said "in the higher legal latitudes of Delhi the dual system (in the legal profession) was regarded as obsolete and anomalous. *There is a tell-tale note at the top of the Rules* framed by the Supreme Court for the enrolment of advocates to the effect that they are subject to revision and the judges were considering abolishing the dual system. To achieve a dubious or even *laudable* purpose by straining the law is hardly edifying. Parties and policies have no place in the pure region of the law and courts of law would serve their country better by discarding all extraneous *considerations* and uncompromisingly observing divine detachment." The Supreme Court said that, in imputing improper motives, the limit of bona fide criticism had been overstepped; there was a clear tendency to affect the dignity and prestige of the court. The editor and publisher were in gross contempt.[20] While proceedings are pending, any act calculated to interfere with the due course of justice such as withholding an application from a party to the court [21] or threatening a party to induce him to abandon proceedings [22] or publishing an article describing a party as the king of liars [23] or otherwise attempting in any way to influence the decision of the court are contempt.

The law declared by the Supreme Court is binding on all courts in India.[24] The principle on which a case is decided is binding but

[18] Under the Code of Criminal Procedure, 1898, s. 164.
[19] *Rao Harnarain Singh* v. *Gumani*, A.I.R. 1958 Punj. 273.
[20] *Re the Editor of the Times of India*, A.I.R. 1953 S.C. 75.
[21] *Jyotirmoy* v. *Government*, A.I.R. 1952 Cal. 562.
[22] *Shankar Lal* v. *M. S. Buht*, A.I.R. 1956 All. 160.
[23] *Qari Nasir* v. *Anis.*, A.I.R. 1941 Oudh 67.
[24] Art. 141.

not the application of it. When not unanimous, a bench of the Supreme Court decides by a majority. If there is an agreed judgment of the majority, it is the reasons for their decision that bind[35] but, *as every judge is free to deliver an independent judgment,*[36] *the* majority may give different reasons for the same decision, which makes it difficult to say what law was declared in the case. The Supreme Court has deprecated indulgence in *obiter dicta*[37] but maintained that they are entitled to considerable weight.[38] The law declared is only binding on courts subordinate to the Supreme Court; it is not bound by its own decisions but will be slow to overrule a previous decision not obviously erroneous[39]; the reluctance to dissent is more apparent in relation to the general law than in constitutional matters. The Supreme Court is not bound by decisions of the Privy Council or the Federal Court, though High Courts are.

The *Supreme Court may make any order necessary to do complete* justice in any case before it and its order may be enforced in accordance with rules made by the President[40] which may be superseded by law made by Parliament.[41] All civil and judicial authorities in India are obliged to act in aid of the Supreme Court.[42] The Supreme Court has power to make rules regarding its procedure and persons concerned with it.[43]

Original Jurisdiction of the Supreme Court

The Supreme Court has exclusive original jurisdiction over disputes between one State and another or between the Union and a State, *in so far as it involves any question of law or fact on which* the existence of a legal right depends,[44] but this jurisdiction is "subject to the Constitution." It does not extend to disputes regarding the waters of an inter-State river, which are decided by a tribunal constituted under the Inter-State Water Disputes Act, 1956,[45] or to the allocation of shares in proceeds of taxes distributable between the Union and the States, which is decided by the President on the report of the Finance Commission[46] or to the extra expense incurred

[35] *Ram Singh* v. *Delhi*, A.I.R. 1951 S.C. 270.
[36] Art. 145 (5).
[37] *Basheshar Nath* v. *Commissioner of I.T.*, A.I.R. 1959 S.C. 149.
[38] *Commissioner of I.T.* v. *M/s Vazir Sultan*, A.I.R. 1959 S.C. 814.
[39] *Dwarkadas* v. *Sholapur S. & W. Co.*, A.I.R. 1954 S.C. 119.
[40] Supreme Court (Decrees and Orders) Enforcement Order, 1954.
[41] Art. 142.
[42] Art. 144.
[43] Art. 145.
[44] Art. 131.
[45] Art. 262.
[46] Art. 280.

by a State in carrying out directions from the Union regarding communications,[37] or in the exercise of the Union executive power,[38] or to the apportionment of liability for court expenses and pensions,[39] which are referred to an arbitrator appointed by the *Chief Justice* of India.

The "*legal right*" *which renders* a *dispute* cognisable by the court need not be of such a nature that it could arise between two individuals but it must be a right recognised by law and capable of being enforced by the power of the State, though not necessarily in a court of law.[40]

This jurisdiction may be excluded by previous agreement between the parties and it does not extend to any treaty, agreement or *sanad* entered into before the commencement of the *Constitution* and remaining in force.[41] No court may hear a claim arising out of any treaty, agreement or *sanad* entered into before the commencement of the Constitution by an Indian ruling Prince and the Dominion Government or any predecessor Government or any dispute over a right accruing from such treaty, agreement or *sanad*.[42] This continues the pre-independence rule that the *Government of India was the sole judge of the rights* and liabilities existing between it and a Princely State. The prohibition extends to disputes between private individuals regarding rights accruing out of any agreement between the Government of India and a ruling Prince. The former ruler of Seraikella challenged the action of the Dominion Government in assuming the administration of his State. When independence came, he signed the usual instrument of accession, *surrendering power over* defence, foreign affairs and communications. He subsequently signed another instrument, purporting to cede full sovereignty, which he contended was void for want of consideration and because no figure had been inserted in the blank space in the clause related to his privy purse. It was held that the suit was barred.[43] In defence to a suit to recover property it was pleaded that the Maharaja of Patiala had vested it in the defendant. It was held that *vis-à-vis* the Government of India in this matter the Maharaja was an independent sovereign, so the suit could not be maintained.[44]

A entered into an agreement with the ruler of Jind to manufacture cement and pay income tax at four per cent. up to five lakhs

[37] Art. 257. [38] Art. 258.
[39] Art. 290.
[40] *United Provinces* v. *Governor-General*, A.I.R. 1939 F.C. 58.
[41] Art. 131, Proviso.
[42] Art. 363.
[43] *State of Seraikella* v. *Union*, A.I.R. 1951 S.C. 253.
[44] *S. Anup Singh* v. *Sardhani*, A.I.R. 1958 Punj. 116.

and five per cent. on the excess. The Prince signed the usual instrument of accession when independence came but on May 5, 1948, Jind was merged with other States in Pepsu, the Prince covenanting that all his rights and jurisdiction should vest in Pepsu and be exercisable as provided by the covenant or the constitution to be framed; all duties and obligations of the prince would devolve on the Rajpramukh of Pepsu. On August 20, 1948, the Rajpramukh made an Ordinance repealing the laws of all other States uniting to form Pepsu and made the laws of Patiala enforceable throughout Pepsu. Pepsu became a Part B State and on April 13, 1950, the Indian Finance Act, 1950, was applied in the State, with the result that from August 20, 1948, to April 13, 1950, A was assessed to income tax under Patiala law and after April 13, 1950, under Indian law. A contended that this was a breach of his agreement with the Prince. It was held that, assuming the agreement to be comparable to a private Act of Parliament, the Rajpramukh was no party to it; the Prince's covenant vesting his rights and jurisdictions did not impose any obligations on Pepsu; the Ordinance was not a breach of any contract entered into by Pepsu. A's rights under the agreement had not been recognised by Pepsu; A's rights came to an end with the promulgation of the Ordinance and he had no outstanding rights under the agreement.[43]

A dispute between an individual on the one hand and the Union or a State on the other hand is not within the jurisdiction of the Supreme Court; it is cognisable by the court having jurisdiction in a similar dispute between two individuals.

Appellate Jurisdiction of the Supreme Court

To enable the Supreme Court to act as guardian of the Constitution, it has appellate jurisdiction from any judgment, decree or final order of a High Court, either on the certificate of the High Court that a substantial question of interpretation of the Constitution is involved or if satisfied that such certificate was wrongly refused.[44] This jurisdiction does not depend on the nature of the proceedings. "Judgment" means, in a civil case, a judicial decision on the merits of a dispute, setting out the questions for determination, the findings thereon and the reasons; in a criminal case it must also involve a conviction or acquittal. "Decree" is a formal expression in a civil case of an adjudication on all or some of the matters in dispute. A "final order" is one which, if undisturbed, puts an end to litigation or which, if decided in favour of the appellant, would have been

[43] *D.D. Cement Co. v. I.T. Commissioner*, A.I.R. 1958 S.C. 816.
[44] Art. 132.

sufficient for the disposal of the case. If a court holds that no sanction is necessary for a prosecution, that is appealable, because, *had it been decided otherwise, it would have put an end to the proceedings.* A question is "substantial" if it is of considerable public interest or private importance and requires interpretation by the Supreme Court. It is "involved" if a decision on it is essential to the proper determination of the case.[47] Though the admission of an appeal has been granted on a point of constitutional law, the appellant may, with the leave of the court, urge any other point. A bench of five or more judges is necessary to decide a point of constitutional law.[48]

The court is not only or principally a constitutional court; it is also a general court of appeal and, apart from the powers specifically mentioned in the Constitution, it has such jurisdiction as was exercised by the Federal Court before the commencement of the Constitution,[49] *e.g.*, in income tax matters.

On the civil side, an appeal will not, unless Parliament so provides, lie from a decision of a single judge of a High Court.[50] At present the list of matters which can be heard by a single judge can be amended by a High Court; a provision by Parliament enumerating *them would seem desirable. An appeal lies from any other* judgment, decree or final order (which in this context is restricted to an *order which, if undisturbed, puts an end to the proceedings) of a* High Court if that court certifies that the amount in dispute at the inception of the litigation, and when the certificate is sought, *is not* less than Rs. 20,000.[51] The figure for appeals to the Privy Council was Rs. 10,000, but owing to the fall in the purchasing power of the rupee, the right of appeal has been enhanced rather than restricted. If A sues Z to recover Rs. 20,000 and gets a decree for Rs. 10,000 in the court of first instance, which is increased to Rs. 15,000 by the High Court, neither A nor Z can appeal to the Supreme Court on this ground. An appeal also lies on a certificate that the judgment or order involves, directly or indirectly, a claim or question respecting property worth Rs. 20,000.[52] If A sues Y and Z for partition and possession of his one-third share of joint family property, the market value of which is Rs. 21,000, although *A's share is only* worth Rs. 7,000, the decree involves a question relating to the whole property and A, Y and Z *each have a right of appeal.* An appeal *also* lies on a certificate that the case is fit for appeal but, if the High Court has

[47] *Hansraj* v. *R.*, A.I.R. 1949 All. 632.
[48] Art. 145 (3).
[49] Art. 135.
[50] Art. 133 (3).
[51] Art. 133 (1) (*a*).
[52] Art. 133 (1) (*b*).

court has said that, in criminal matters, it will only grant special leave to appeal when special and exceptional circumstances exist and grave injustice has been done,[44] but it would seem that it has not been ungenerous in granting leave. Special leave has been granted to appeal against findings of administrative tribunals, especially of industrial tribunals since the abolition of the Industrial Appeals Tribunal and in such appeals the Supreme Court has laid down a wide variety of principles of industrial law. Obviously such work is of great public importance, for industry cannot prosper if the employer is uncertain of the nature and extent of his liabilities to his employees but, if precedence is to be given to such work, it can only be by postponement of the ordinary work of the court, such as civil appeals. In no aspect of its jurisdiction to grant special leave to appeal will the court normally go into questions of fact and, in granting special leave to appeal from the finding of an administrative tribunal, it will not function as a court of error or assume the powers of the tribunal.[45] It will only grant relief when a tribunal has exceeded its jurisdiction or approached the matter before it in a manner likely to result in injustice or adopted a procedure violating the rules of natural justice.[46] The court will point out the error and leave it to the tribunal to make the decision. The rules of the Supreme Court provide that where an appeal lies on a certificate issued by the High Court on grounds mentioned above, no application for special leave will be considered unless a certificate has been refused[47] and that, except on sufficient cause shown, a petition for special leave will not be heard unless presented within sixty days of the High Court's refusal or ninety days from the order impugned.[48]

Constitutional Writs

The right to an appropriate judicial remedy for the infringement of a Fundamental Right is a Fundamental Right itself and the Supreme Court is empowered to issue directions, orders and writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for their enforcement.[49]

Habeas corpus is intended to secure the release of a person illegally or improperly detained in custody. It may be applied for not only by the person detained but by another on his behalf, if he gives reasons for the inability of the person detained to act; if the

[44] *Hem Raj* v. *Ajmer*, A.I.R. 1954 S.C. 462.
[45] *Bharat Bank* v. *Employees*, A.I.R. 1950 S.C. 188.
[46] These involve an impartial tribunal, notice to any person against whom prejudicial action is contemplated and opportunity for him to be heard.
[47] S.C. Rules, Ord. 31, r. 2.
[48] S.C. Rules, Ord. 31, r. 1.
[49] Art. 32.

person is a minor, the petitioner, if not his legal guardian, must satisfy the court that he is acting in the minor's interest.[70] The writ may be sought by a person released on bail because he is still in the constructive custody of the court. If a person is in custody otherwise than in accordance with procedure established by law, he is entitled to release, because his right to personal liberty[71] has been violated. If he is in custody by authority of a law violating a Fundamental Right, such law is void and he is entitled to his release.

Mandamus is issued to require a public authority to do an act incumbent on it by law or forbear doing an act which is illegal. This writ is principally used to correct executive authorities. An executive order depriving a person of his property without authority of law violates the Right to freedom from expropriation.[72] An executive order passed under any law repugnant to a Fundamental Right is illegal. In either case the court may issue a writ to protect the Right involved.

Certiorari and prohibition are addressed to judicial and quasi-judicial authorities,[73] the former being used when the impugned proceedings are completed, the latter if they are pending. They will issue only to correct an order of a judicial nature, when the authority has wrongly refused jurisdiction, or acted without jurisdiction or exceeded or abused its jurisdiction or failed to act in accordance with natural justice or when there is an error of law apparent on the face of the record. The meaning of the last expression is technical and somewhat obscure; it probably means any such error of law as the court thinks likely to result in serious injustice. If a judicial order is made in accordance with a law violative of a Fundamental Right, the appropriate writ will issue.

Quo warranto resembles habeas corpus in that the Right of the person applying for it need not be in jeopardy but he must not be a mischief-maker or mere busybody. The object of the writ is to call in question appointments to public office. It can be used to impugn such an appointment as repugnant to the Right to equality of opportunity in State employment,[74] or discriminatory on grounds of religion, race, sex, descent or place of birth.[75]

The court is not restricted to the named writs in choosing remedies for the violation of the Fundamental Rights complained of; no petition is liable to be dismissed because the petitioner does not

70 *Raj Bahadur v. Legal Remembrancer*, A.I.R. 1953 Cal. 522.
71 Art. 21.
72 Art. 31 (1).
73 A quasi-judicial authority is one which, though it has not the trappings of a court, functions by ascertaining facts and applying to them existing rules.
74 Art. 16 (1).
75 Art. 16 (2)

specify a writ or asks for an inappropriate one. The court does not regard itself as hampered by the history of the writs or the procedural technicalities attached to them in England. The differences and changes of opinion of English judges on particular cases are ignored; regard is only had to the fundamental principles regulating the exercise of the writs in England.[76]

With the exceptions noted above in relation to habeas corpus and quo warranto, in a writ petition the petitioner cannot rely on the violation of another's Fundamental Right.[77] He must come with clean hands; if his petition and affidavit in support suppress relevant facts or contain false or misleading statements, the case is liable to dismissal without reference to its merits.[78] The right to the remedy may be lost by laches or acquiescence; this does not mean mere delay or inactivity but such conduct as is calculated to give the other party cause to believe that the situation is accepted.[79]

Advisory Jurisdiction of the Supreme Court

The President may refer to the Supreme Court any question of law or fact which has arisen or which is likely to arise. This includes a question arising out of a treaty or agreement, which excludes the original jurisdiction of the Supreme Court or, having been entered into before the commencement of the Constitution, is excluded by the Constitution from such jurisdiction. The court, after such hearing as it thinks fit, may report its opinion to the President.[80] The Federal Court had a similar jurisdiction under the Government of India Act, 1935; the Judicial Committee of the Privy Council has a similar jurisdiction under the Judicial Committee Act, 1833, and so has the Canadian Supreme Court under the Canadian Supreme Court Act, 1906. Though some State Supreme Courts have an advisory jurisdiction, the Supreme Court of the U.S.A. has always disclaimed such jurisdiction; the High Court of Australia has taken the same line.

American and English judges have commented adversely on the exercise of advisory jurisdiction. Mr. Justice Frankfurter has cited instances of disappointing advisory opinions of State Supreme Courts on contemplated legislation and opined that an advisory jurisdiction lacks the impact of actuality and the intensity of immediacy; there is a lack of vigour in presenting facts behind the legislation and the opinion is given on sterilised and mutilated issues.[81] Lord Merrivale

[76] *T. C. Basappa v. Nagappa*, A.I.R. 1954 S.C. 440.
[77] *Chiranjit Lal v. Union*, A.I.R. 1954 S.C. 119.
[78] *Asiatic Engineering Co. v. Acchru Ram*, A.I.R. 1951 All. 746.
[79] *Nain Sukh Das v. U.P.* (1953) 4 S.C.R. 384.
[80] Art. 143.
[81] Frankfurter, 37 Harv.L.R. 61

has said that it is not the business of the judiciary to advise the Executive; the natural result is to compel it to share responsibility for the acts of the Executive and so weaken its own authority.[42]

It would seem that these strictures suggest restriction rather than elimination of this jurisdiction and, after experience in the Federal Court, opinion on the Indian sub-continent seems to be that the convenience of this jurisdiction outweighs the risks involved. A Federal Court decision[43] resolved a doubt about the extent of the validity of a statute affecting succession among Hindus, which was causing much inconvenience, but it was, no doubt, embarrassing to have to defend this decision when subsequently assailed by new arguments in a contested case.[44] The Supreme Court has given an opinion on an Act empowering the application to Territories of legislation in force elsewhere in India, involving the extent to which the legislative power may be delegated,[45] on a Bill passed by a State Legislature and reserved for the President's consideration, involving Fundamental Rights,[46] and on the question of implementing an agreement with Pakistan for an exchange of territory.[47] In each of these cases the outcome has been advantageous. The Supreme Court is not obliged to give its opinion, the President is not bound to accept the advice given; the opinion of the Supreme Court given in excess of its advisory jurisdiction is not binding on the other courts in India.

The High Courts

There is a High Court for each State.[48] Parliament may establish a High Court for two or more States or for two or more States and a Territory,[49] and may also extend to or exclude from a Territory the jurisdiction of a High Court.[50] Every High Court is a court of record,[51] consisting of a Chief Justice and such puisne judges as the President thinks necessary.[52] Before making an appointment, the President must consult the Chief Justice of India and the Governor; if the appointment of a puisne judge is under consideration, the Chief Justice of the court must also be consulted. A candidate for this office must have held judicial office for ten years or been an advocate of one or more High Courts for the same period. A judge may hold

[42] (1928) *Parliamentary Debates*, 5th Series, H. of L. 763.
[43] *Re Hindu Women's Rights to Property Act*, 1941 F.C.R. 12.
[44] *Umayal v. Lakshmi*, A.I.R. 1945 F.C. 25.
[45] *Re Delhi Laws Act*, A.I.R. 1951 S.C. 332.
[46] *Re Kerala Education Bill, 1957*, A.I.R. 1958 S.C. 956.
[47] *Reference by President of India under Art. 143 (1)*, A.I.R. 1960 S.C. 845.
[48] Art. 214.
[49] Art. 231.
[50] Art. 230.
[51] Art. 215.
[52] Art. 216.

office until he is sixty-two; he may resign and may be removed by the same procedure as a Supreme Court judge.[93] An ex-judge may only practice before the Supreme Court and other High Courts.[94] The President may transfer a judge to another High Court.[95] An additional judge may be appointed for a period not exceeding two years to meet a temporary increase in the pressure of work and an acting judge may be appointed to perform the duties of a temporarily disabled judge.[96]

The Constitution continues the jurisdiction of powers and the law administered by a High Court immediately before the commencement of the Constitution but the ban on original jurisdiction in matters concerning the revenue, imposed in 1781 to put an end to disputes between the Supreme Court and the Council in Bengal, is abolished.[97] "Jurisdiction" in this context means competence to hear and decide cases; "Powers" are administrative powers such as power to regulate procedure and prescribe duties of officers. In the case of the older High Courts these are contained in Letters Patent mostly from the Crown but modified by Orders made under the *Independence Act, 1947*. The Assam High Court, which came into existence in 1948, has its powers and jurisdiction defined in an Order made by the Governor-General under the *Government of India Act, 1935*.

Parliament may legislate on the jurisdiction and powers of the High Courts on matters on the Union List[98]; the State Legislature has similar powers in relation to the State High Court on matters on the State List,[99] and legislative power in relation to matters on the Concurrent List is shared,[1] parliamentary law normally prevailing in case of repugnancy.

The High Courts are empowered by the Constitution to issue constitutional writs and order orders not only, like the Supreme Court, to protect a Fundamental Right but also "for any other purpose."[2] But whereas the Supreme Court has jurisdiction over the whole territory of India, a High Court's territorial jurisdiction is normally limited to the State. The Constitution, as originally enacted, required the respondent to a writ petition to be within the court's territorial jurisdiction, so that, if a petitioner sought a remedy against the Union Government or an authority stationed in Delhi,

[93] Art. 217. See p. 165.
[94] Art. 220.
[95] Art. 222.
[96] Art. 224.
[97] Art. 225
[98] Sched. 7, List 1, item 78.
[99] Sched. 7, List 1, item 65.
[1] Sched. 7, List 3, item 46.
[2] Art. 226.

complaining of an infringement of a Fundamental Right, he had the option to move the Supreme Court or the High Court of the Punjab, which exercises jurisdiction in the territory of Delhi; if he sought a writ "for any other purpose," even though he resided and the cause of action arose in the southernmost part of India, he could only move the High Court of the Punjab. A recent amendment of the Constitution[3] has given jurisdiction to the High Court within whose jurisdiction the cause of action arises.

The object of empowering the High Courts to issue writs and orders "for any other purpose" was to put them in the same position as the Queen's Bench Division in England,[4] so that this new jurisdiction is not to be used to supersede the pre-existing forms of legal process. A writ can be demanded to protect a Fundamental Right as of right but if it is sought "for any other purpose" it is a discretionary remedy. The Supreme Court has said that the jurisdiction must be restricted to cases in which there has been an error as to jurisdiction, violation of natural justice or error apparent on the face of the record, resulting in manifest injustice.[5] It may be invoked for the enforcement of a legal right or to compel performance of a legal duty, when there is no other adequate legal remedy.[6]

What has been said above regarding the use of the constitutional writs in the Supreme Court applies in the High Courts but needs some supplementation in relation to their power to issue a writ "for any other purpose."

Habeas corpus may be used to call in question the detention of a person in public or private custody but it cannot be granted to review a judgment of a court sentencing a person to imprisonment. If the detention purports to be under the authority of a statute, the scope of the inquiry will usually depend on the degree of discretion allowed to the official who ordered the detention. If a person is detained under the Extradition Act, 1903, the court can inquire whether its somewhat detailed provisions have been complied with but if he has been detained under the Preventive Detention Act, 1950, so much discretion has been left to detaining authorities that the inquiry will be restricted to matters of form and abuse of power.

Mandamus, originally affirmative only, became negative also in India by the enactment of section 42 of the Specific Relief Act, 1877. Its purpose is not to establish rights but to enforce them. It cannot be used to enforce a contract. Unless the respondent has clearly indicated that he will not act as the law requires, the petitioner must

[3] *The Constitution (Fifteenth Amendment) Act, 1963.*
[4] *Election Commission* v. *Saka Vankata* (1953) 4 S.C.R. 1144.
[5] *Veerappa* v. *Raman*, A.I.R. 1952 S.C. 192.
[6] *Bagaram* v. *Bihar*, A.I.R. 1950 Pat. 387.

show that performance or forbearance was demanded and refused. The writ will not issue when the act requested is not feasible or when the act forbidden has been done and cannot be reversed. The writ can be used to correct cases of excess of jurisdiction as when a polling officer, empowered, in the event of disorder, to suspend polling temporarily and keep the station open beyond the normal closing time for the period lost, postponed polling *sine die*.[7] It can also be used to correct abuse of jurisdiction as when a local government board, empowered to remove temporary encroachments on roads, confiscated a bicycle left on a public path.[8] Power may be coupled with a duty to decide whether the conditions for its exercise are satisfied; if the decision is clearly wrong, it can be corrected by mandamus, as when a commissioner of police, empowered to license restaurants subject to conditions prescribed by him to prevent disorder, refused a licence though his conditions had been complied with.[9] Even when a power is to be exercised at the discretion of the grantee, it must be exercised bona fide and his use or refusal to use it may be corrected, unless the discretion is absolute: normally the statute indicates for whose benefit the discretion is to be exercised but otherwise it must be exercised to further the object of the statute, as when it was held that discretion to refer to the High Court the value of the stamp required on a document must be exercised for the benefit of the person obliged to provide the stamp.[10] Mandamus will issue if a grantee of a discretionary power delegates it or abdicates or fetters it, as when a commissioner of police, authorised to license as hackney carriages vehicles fit for the purpose, exhibited a particular type of *ghari* and refused to license any other type.[11]

A judicial or quasi-judicial authority may have jurisdiction in a matter if certain circumstances are satisfied or if certain collateral facts exist but the statute creating it may confer jurisdiction if the authority is satisfied that the collateral facts exist. In the former case a court, moved to issue certiorari or prohibition, will itself inquire into the existence of the collateral facts; in the latter case the collateral facts stand on the same footing as the facts of the main inquiry, a finding on which will not be disturbed unless there is no evidence to support it. If bias is alleged, the impugned proceedings will be quashed if the slightest pecuniary interest is established; if personal interest is pleaded, a real likelihood of bias must be established. When a judicial or quasi-judicial tribunal is *functus*

[7] *Kartar Singh* v. *Pepsu*, A.I.R. 1951 Pepsu 141.
[8] *Birdichand* v. *Municipal Committee*, A.I.R. 1954 Ajmer 3.
[9] *Rustom* v. *Kennedy* (1901) 3 B L.R. 653.
[10] *Chief Controlling Revenue Authority* v. *Maharashtra Mills*, 1947 49 Bom.L.R. 893.
[11] *Gell* v. *Taja* (1902) I.L.R. 1927 Bom. 307.

officio, the person in charge of the record may be made the respondent.

Quo warranto has been used to call in question appointments to offices created by the Constitution.

A High Court has power of superintendence over all courts and tribunals within its territorial jurisdiction other than courts-martial.[12] This includes power to call for returns and, with the approval of the Governor, make rules of practice, prescribe forms and books and settle fees for clerks, officers and legal practitioners.[13] Whether the power of superintendence is limited to such matters has long been a vexed question in India. The Government of India Act, 1935, specifically prohibited its extension to interference with judicial orders of subordinate courts, when not provided for by statute,[14] but the Constitution has reversed the position. The power of superintendence may be invoked to correct judicial orders; it should, however, be used sparingly, not for the purpose of correcting errors but to keep subordinate courts within the bounds of their authority.[15]

A High Court may withdraw from a subordinate court any case involving a substantial question of constitutional law and either dispose of the case itself or decide the constitutional point and remand the case for disposal.[16]

Parliament may constitute a High Court for a territory or declare any court in a territory to be a High Court for specified purposes of the Constitution.[17] Parliament has declared the courts of the judicial commissioners in Himachal Pradesh, Manipur and Tripura to be High Courts for certain purposes.[18]

Subordinate Courts

The Constitution empowers the Indian Legislatures to legislate on the jurisdiction and powers of subordinate courts on matters within their legislative competence.[19] State Legislatures are empowered to legislate on the constitution and organisation of all courts except the Supreme Court and the High Court.[20]

The Constitution does provide, however, that appointment of district judges, their posting and promotion shall be made by the Governor in consultation with the High Court; a person not already in Government service is not eligible for appointment as a district

[12] Art. 227 (1) and (4).
[13] Art. 227 (2) and (3).
[14] Government of India Act, 1935, s. 224.
[15] *Waryam Singh v. Amarnath*, A.I.R. 1954 S.C. 215.
[16] Art. 228.
[17] Art. 241.
[18] The Judicial Commissioners' Courts (Declaration as High Courts) Act, 1950.
[19] Sched. 7, List 1, item 78; List 2, item 65; List 3, item 46.
[20] Sched. 7, List 2, item 3.

judge unless he has practised for seven years at the bar and is recommended by the High Court.[21] Other appointments to the State judicial service are made by the Governor after consultation with the public service commission and the High Court,[22] but the Governor may prescribe classes of magistrates not governed by this provision.[23]

[21] Art. 233.
[22] Art. 234.
[23] Art. 237.

CHAPTER 11

FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES

Effect of the Rights

Indian law, including delegated legislation and custom, is liable to avoidance for repugnancy to the Fundamental Rights. All law in force before the Constitution is void to the extent of its inconsistency with any Fundamental Right,[1] but although such law may be void as from January 26, 1950, it is valid as to rights and liabilities created before that date and as to persons not entitled to the Right involved after that date.[2] As to post-Constitution laws, the Constitution declares that the State shall not make any law abridging a Fundamental Right and any such law is void to the extent of the contravention.[3] Though at first the courts usually regarded a law hit by this rule as only under eclipse, so that it could be vitalised by an amendment of the law or the Constitution removing the inconsistency, it is now held that such a law is void in the sense that it has no legal existence, so that it cannot be resuscitated.[4] But a law may be repugnant to a Right given to citizens only and the question whether it is enforceable in relation to a non-citizen remains in doubt. If only part of a law is open to objection, the question of severability, discussed at p. 93, arises. No law can be impugned until it has been passed.[5]

Enforcement of the Rights

A Fundamental Right may be pleaded as part of a cause of action or defence in a civil suit or as a defence in a criminal case but the right to a remedy for infringement of a Right is a Fundamental Right itself. The Supreme Court[6] and the High Courts[7] have concurrent jurisdiction to issue orders and writs for this purpose. If a petitioner for a writ fails in the High Court, he will normally have a right of appeal. At first it was held that, having failed in the High Court, he could start anew in the Supreme Court, but this is now held to be a violation of the principle of *res judicata*.[8]

[1] Art. 13 (1).
[2] *Keshavan* v. *Bombay*, A.I.R. 1951 S.C. 128
[3] Art. 13 (2).
[4] *Deep Chand* v. *U.P.*, A.I R. 1959 S.C. 648.
[5] *Chotey Lal* v. *U.P.*, A.I.R. 1951 All. 223.
[6] Art. 32.
[7] Art. 226.
[8] *Daryao* v. *U.P.*, A.I.R. 1961 S.C. 1457.

A Fundamental Right defined in the form of a command to the State, such as the prohibition against discrimination,[9] cannot be waived as the Right is enacted in the public interest but with regard to a Right enacted for the benefit of an individual, such as the Right to hold property,[10] the position is not settled.[11]

The Rights to freedom from discrimination on grounds of religion, race, caste, sex or place of birth,[12] to equality of opportunity in State employment,[13] the seven democratic freedoms,[14] the Right to conserve a minority culture,[15] and the Right to maintain denominational schools,[16] are restricted to citizens. All other rights are enjoyed by "persons." A person includes a corporation but a corporation cannot be a citizen.[17] "The State," which, in the present context, includes the Legislatures, Governments, local government boards and their instrumentalities, is neither a person nor a citizen.[18]

Parliament may determine the extent to which the Rights apply to the armed forces and other forces, like the police, charged with the maintenance of public order.[19] This may be implied from restrictions on the Rights in a law made by Parliament such as the Army Act, 1950, the Air Force Act, 1950, and the Navy Act, 1957. The pre-Constitution laws relating to duties and discipline of the armed forces and the police were held to continue in force notwithstanding inconsistency with the Fundamental Rights.[20]

Parliament may by law indemnify any person in respect of any act done in maintaining or restoring order while martial law is in force and validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law.[21] The prerogative or common law right to proclaim martial law is part of the unwritten law of India and the courts claim jurisdiction to decide whether the circumstances justified its proclamation. Most acts done under martial law would violate Fundamental Rights and though the remedies would probably be suspended under Article 359, they would revive when the proclamation of emergency was withdrawn. Parliament may, nevertheless, by an Act of Oblivion and Indemnity, protect those responsible for such violations.

[9] Art. 14.
[10] Art. 19.
[11] *Basheshar* v. *Commr. of I.T.*, A.I.R. 1959 S.C. 149.
[12] Art. 15.
[13] Art. 16.
[14] Art. 19.
[15] Art. 29.
[16] Art. 30.
[17] *State Corporation of India* v. *Comml. Tax Officer*, A.I.R. 1963 S.C. 1811.
[18] *Shiv Parshad* v. *Punj.*, A.I.R. 1957 Punj. 150.
[19] Art. 33.
[20] *R. Chatterjee* v. *Sub-Area Commander*, A.I.R. 1951 Mad. 777.
[21] Art. 34.

Rights to Equality

All persons are entitled to (a) equality before the law and (b) the equal protection of the law.[22] But (a) is not infringed by a provision[23] protecting government servants from prosecution for acts done in their official capacity without the sanction of government.[24] As to (b) it has been held that similarity of treatment of persons similarly situated is enough; discrimination for or against a class on *rational grounds is permissible. There must be an intelligible difference* between things or persons in the class and those omitted, having *a rational relation to the object of the law. The Legislature must be* presumed to understand the needs of the people and deal with problems demanding attention; it may restrict its attention to evils calling for immediate action; it must be presumed to discriminate on adequate grounds.[25] Provided it is really unique, there is no objection to legislation to meet an individual case.[26]

A law which permits discrimination by officials as a matter of policy is as liable to avoidance as a law discriminatory in itself but, if a law assumes that an official will act fairly but he discriminates in a way to violate the Right, he is liable to correction by the court, though the statute is valid.[27] Many Indian laws leave it to government or other delegate to determine the persons or things to which it is to apply. If the law, directly or by implication, lays down a *principle to be followed, having a rational connection with its object,* it will be upheld. Two similar Acts provided for trial of criminal cases by a procedure less favourable to the accused than under the Code of Criminal Procedure, 1898. One was struck down because the power to decide the persons and cases to which it was to apply was untrammelled.[28] The other was intended to meet an exceptionally heavy incidence in certain types of regional crime, and, in effect, required government to select the cases to which it applied on the bases of type of crime and territory; it was upheld.[29]

If discrimination results from the application of laws made by different Legislatures, there is no violation of the Right.[30]

The State shall not discriminate against any citizen on grounds *only* of religion, race, caste, sex, place of birth or any of them, but *it may make special provisions for women and for the advancement*

[22] Art. 14.
[23] Crim. Proc. Code, 1898, s. 197.
[24] *Matajog v. Bhari*, A.I.R. 1956 S.C. 44.
[25] *Ram Krishna v. Justice Kendolkar*, A.I.R. 1958 S.C. 538.
[26] *Chiranjit Lal v. Union*, A.I.R. 1951 S.C. 41.
[27] *Dhanraj Mills v. Kocher*, A.I.R. 1951 Bom. 132.
[28] *State of W. Bengal v. Anwar Ali*, A.I.R. 1952 S.C. 75.
[29] *Kathi Raning v. Saurashtra*, A.I.R. 1952 S.C. 123.
[30] *State of M.P. v. G. C. Mandawar*, A.I.R. 1954 S.C. 493.

of backward citizens, scheduled castes and scheduled tribes.[31] A plea of discrimination on one or more of these grounds may be defeated by proof of a ground not enumerated as when a woman was refused admission to a mixed college, partly on grounds of sex and partly because of a scheme to develop a women's college.[32] A statute imposing monogamy on Hindus but not affecting a Muslim's right to four wives was upheld because of the additional ground that the Constitution recognised that the two communities should be governed by their personal law.[33] Communal representation in local government has been held unconstitutional[34] and so has the power of a Court of Wards to disqualify a proprietor of land on the ground that she was a female.[35] But an attempt to impugn the penal provision relating to adultery,[36] which, while punishing the male delinquent, immunised the female, either as principal or abettor, was upheld.[37] Presumably a special provision for women must be reasonable.

The provisions relating to backward citizens were introduced by a constitutional amendment[38] after a decision that a Government order allotting places in educational institutions in fixed proportions among Brahmins, non-Brahmin Hindus, backward Hindus, Harijans, Anglo-Indians and Muslims offended against the Right[39]; it is now possible to allot such places to backward citizens and scheduled castes and tribes. The Mysore Government reserved 68 per cent of the places in technical colleges for certain castes on the ground that they were backward classes. This was held unconstitutional. The provision for special treatment of backward classes is enabling, not mandatory; it is a special provision and as such should not have been applied to more than half the places. Moreover caste is not an admissible criterion of backwardness. Backwardness must be social and educational; the ultimate test will be poverty. The other test applied, castes with less than the average percentage of admissions to State Schools, was not a proper test.[40]

Untouchability is abolished.[41] This refers to the social disabilities imposed on certain citizens by reason of their birth in certain castes and does not extend to social boycott on account of conduct.[42]

31 Art. 15.
32 *Anjali v. W. Bengal*, A.I.R. 1952 Cal. 825.
33 *Srinivasa v. Saraswathi*, I.L.R. 1953 Mad. 78.
34 *Nain Sukh Das v. U.P.* (1953) 4 S.C.R. 384.
35 *Cracknell v. U.P.*, A.I.R. 1952 All. 746.
36 Indian Penal Code, s. 497.
37 *Dattatraya v. Bombay*, A.I.R. 1953 Bom. 311.
38 Constitution (First Amendment) Act, 1951.
39 *Dorairajan v. Madras*, A.I.R. 1951 Mad. 120.
40 *M. R. Balaji v. Mysore*, A.I.R. 1963 S.C. 649.
41 Art. 17.
42 *Devaraiah v. Padmanna*, A.I.R. 1958 Mys. 84.

No citizen on the ground mentioned above may be denied access to shops, hotels, restaurants, places of entertainment or public water supplies, bathing ghats and other places of public resort.[43] These rights are mainly prohibitions of discriminatory conduct by other citizens; breaches of them are punishable by fine or imprisonment under the Untouchability (Offences) Act, 1955.

The State does not confer titles; no citizen may accept a foreign title. *A non-citizen holding public office may not accept from* a foreign State a title, present, emolument or office without the President's permission.[44]

There must be equality of opportunity for all citizens in government service; there must be no discrimination on grounds only of religion, race, caste, sex, descent or any of them,[45] but Parliament may sanction a residence qualification in the case of servants of a State or local government board,[46] and exceptions are permissible in the case of backward citizens[47] and religious institutions.[48]

In regard to this Right also, proof of a single additional ground not enumerated will support an appointment. An authority selecting applicants for appointment may lay down qualifications and apply tests having a proximate connection with the performance of the duties of the office, such as mental ability, knowledge, physical fitness, sense of discipline, moral integrity and loyalty. The principle of equality is not restricted to first appointment. When, owing to a reduction of work, retrenchment became necessary in a certain cadre and some officials were retained because they were political sufferers and displaced persons, it was held that the Right had been infringed, because the selection of officers to be retained was based on considerations irrelevant to ability to perform their duties.[49]

The Democratic Freedoms

It will be more convenient to deal with the Right to hold property together with the Right *to compensation for expropriation later in* this chapter and to deal here with the other six freedoms. Each of the seven may be reasonably restricted in specified interests. What is reasonable may vary in relation to the individual Rights, but there are certain criteria common to all. The procedural as well as the substantive provisions of a law impugned as inconsistent with any of these Rights must both be considered from the standpoint of the

[43] Art. 15 (2).
[44] Art. 18.
[45] Art. 16 (1) and (2).
[46] Art. 16 (3).
[47] Art. 16 (4).
[48] Art. 16 (5).
[49] *Sukhnandan* v. *Bihar*, A.I.R. 1957 Pat. 617.

"reasonable man"; regard must be had to the evil sought to be remedied, to the prevailing conditions and the purpose of the restriction; the duration and territorial extent of the restriction are relevant; the restriction must be proportionate to the evil; the remedy must not be worse than the disease.[50] In one case a law restricting the Right of Association was amended by the inclusion of provisions adapted from the clauses which the Constitution demands must be included in a preventive detention law,[51] but it was held that such restrictions on a basic guaranteed freedom would only be reasonable in very exceptional circumstances.[52]

It is assumed that a person complaining of an infringement of any of the seven freedoms is in enjoyment of his personal liberty. Most penal provisions provide sentences of imprisonment, which involve abridgement of most, if not all, of the seven freedoms but a penal provision is not liable to avoidance for such incidental abridgement of the seven freedoms. It is only when, as with the penal provisions against sedition,[53] there is a direct abridgement of the Right (in this case the Right of Freedom of Speech) that it can be pleaded against the impugned law.[54]

Freedom of Speech

All citizens have the Right of freedom of expression but it may be reasonably restricted in the interests of the security of the State, friendly relations with foreign Powers, public order, decency and morality and in relation to contempt of court, defamation and incitement to an offence.[55]

"Friendly relations with foreign Powers" covers legislation prohibiting defamatory publications regarding persons in authority in foreign States. "Decency and morality" seems restricted to sexual morality and covers the penal provisions dealing with obscene objects and songs.[56] The penal provisions relating to defamation,[57] the inherent powers of the superior courts to punish for contempt and the penal provisions relating to abetment[58] are also protected.

A law punishing activities which tend to cause public disorder is reasonable, even though public disorder does not result, so that the penal provision for publishing words with deliberate and malicious

[50] *N. B. Khare* v. *Delhi*, A.I.R. 1950 S.C. 211.
[51] Art. 22 (4) and (5).
[52] *State of Madras* v. *V. G. Row*, A.I.R. 1952 S.C. 196.
[53] Penal Code, 1860, s. 124A.
[54] *Gopalan* v. *Madras*, A.I.R. 1950 S.C. 27.
[55] Art. 19 (1) (*a*) and (2).
[56] Penal Code, 1860, ss. 292–294.
[57] *Ibid.* ss. 499 and 500.
[58] Penal Code, 1860, Chap. 5.

intent to outrage the religious feelings of a class [39] has been upheld.[40] But the Allahabad High Court has held that the penal provision for publishing words calculated to bring government to contempt, notwithstanding that honest criticism is exempted,[41] is not a reasonable restriction in the interests of the security of the State on the ground that it covers even the mildest expression of bad feeling towards the people for the time being holding high public office.[42]

The object of the Right is to prevent public authorities assuming control of the minds of the public; it contemplates for the Press freedom of expression and freedom to employ necessary instrumentalities for the exercise of the Right but the Press cannot claim immunity from taxation or regulation of labour. Pre-censorship is incompatible with the Right.[43] But a law authorising prohibition of the publication of news likely to cause public disorder for a brief period, with a right to move government to rescind it, is reasonable.[44]

Commercial advertisements are merely incitements to buy goods and are not protected by the Right, which contemplates the propagation of social, political and economic ideas, the furtherance of literature and human thought. A ban on advertisements of patent medicines can only be impugned, if at all, as repugnant to the Right to carry on a trade.[45]

Freedom of Assembly

All citizens have the Right to assemble peaceably without arms but the Right may be reasonably restricted in the interests of public order.[46]

There are various statutory provisions [47] empowering officials to prohibit processions absolutely or except under licence or subject to conditions, if public disorder is apprehended. Provided the prohibition cannot cover an excessively long period or too wide an area, this is a reasonable restriction. Absence of a provision for judicial review is legitimate, as such orders must be made urgently and the official on the spot is best able to gauge the necessities of the situation.[48] A provision prohibiting public meetings on polling day [49] has been upheld.[50]

[39] *Ibid.* s. 295A.
[40] *Ramji Lal* v. *U.P.*, A.I.R. 1957 S.C. 620.
[41] Penal Code, 1860, s. 124A.
[42] *Ram Nandan* v. *U.P.*, A.I R. 1959 All. 101.
[43] *Express Newspapers* v. *Union*, A.I.R. 1958 S C. 578.
[44] *Virendra* v. *Punjab*, A.I.R. 1957 S C. 896.
[45] *Hamdard* v. *Union*, A.I.R. 1960 S.C. 554.
[46] Art. 19 (1) (*b*) and (3).
[47] *e.g.*, Code of Criminal Procedure, 1898, s. 144; Police Act, 1861, s. 30.
[48] *Mathai* v. *T.C.*, A.I.R. 1954 T.C. 47; *Virendra* v. *Punj.*, A.I.R. 1957 S C. 896.
[49] Representation of the People Act, 1951, s. 126.
[50] *Rameshwar* v. *Bihar*, A.I R. 1957 Pat. 252.

Freedom of Association

All citizens have the Right to form associations and unions but the Right may be restricted in the interests of public order or morality.[71]

This Right contemplates the formation of companies, partnerships, professional associations, political parties and trade unions; the restrictions contemplate criminal conspiracy under section 120A of the Penal Code, 1860, and subversive associations. The Madras Criminal Law Amendment Act, 1908, as amended, empowered *government to declare an association unlawful if, in its opinion*, its object was to interfere with the administration of the law or was a danger to the public peace. Grounds had to be given and a member could make a representation within a given time, after which the opinion of an advisory board would be taken. It was held that, as there were no provisions for a judicial inquiry, the Act was unreasonably restrictive.[72]

A provision prohibiting strikes during the pendency of proceedings to settle industrial disputes[73] has been held a reasonable restriction on the Right[74] and a provision whereby a trade union with a membership of 15 per cent. of the employees in a local area was given the right to represent all workers in the industry *vis-à-vis* the employers has been upheld.[75]

The Constitution (Sixteenth Amendment) Act, 1963, has recently authorised the imposition of reasonable restrictions on the Rights of *freedom of speech, of assembly and of association in the interests* of the sovereignty and integrity of India. As yet there has been no occasion for the courts to rule or comment on the scope of this purported extension of legislative power. The reasonableness of any law enacted in purported exercise of this power will still be *justiciable*. But it is difficult to speculate on the probable interpretation to be given by the courts. On the one hand, it might be argued that most laws likely to be enacted to restrict these Rights are in the interests of the sovereignty and integrity of India; on the other hand it *could* be said that any power to restrict a constitutionally guaranteed freedom must be strictly construed and that the new power can only validly be exercised to meet a real danger to the sovereignty and integrity of India.

[71] Art. 19 (1) (*c*) and (3).
[72] *State of Madras* v. *V. G. Row*, A.I.R. 1952 S.C. 196.
[73] Industrial Disputes Act, 1947, ss. 22, 23.
[74] *Janardan* v. *Hukumchand Mills*, A.I.R. 1956 M.B. 199.
[75] *Raja Kulkarni* v. *Bombay*, A.I.R. 1954 S.C. 73.

Freedom of Movement

All citizens have the Right to move freely throughout India but the Right may be *reasonably restricted in the interests of the general* public or of a Scheduled Tribe.[76]

This Right is independent of, and additional to, the Right to personal liberty; it is a protection against parochialism and provincialism.[77] "In the interests of the general public" *is synonymous* with "in the public interest"[78]; it contemplates laws intended to prevent the spread of infectious diseases by prohibiting sick persons using public transport[79] or forbidding entry upon defence works[80] and laws empowering officials to expel potential trouble-makers from a local area.

Laws of the last category again raise the questions whether it is *reasonable to permit expulsion on the subjective satisfaction* of an official and what safeguards are essential. The East Punjab Public Safety Act, 1949, which was to remain in force for two years only, empowered a district magistrate to expel a person, if he were satisfied that this was necessary to prevent him acting to the prejudice of the public safety or order. The expulsion order was only effective for three months, unless extended by government, in which case the expellee would be entitled to make a representation to an advisory board. The district magistrate could not turn a man out of the district in which he resided nor could government send him outside the State. The statute was upheld.[81]

The *statute last mentioned* was aimed at political agitators but it seems that fewer safeguards are necessary in a law providing for the expulsion of dangerous criminals. The City of Bombay Police Act, 1902, empowered the Commissioner of Police to expel a person he believed to be acting so as to cause danger to person or property and to be about to commit violent crime, if witnesses were unwilling to come forward. The period was restricted to two years; permission to enter Bombay could be sought; the expellee was entitled to grounds and could appeal to government. Mainly on the ground that the power was vested in a high and responsible official, the statute was upheld.[82] *But a statute providing for the expulsion of goondas*,[83] defined therein as hooligans, roughs, vagabonds and including persons dangerous to the public peace, was struck down

[76] Art. 19 (1) (*d*) and (4).
[77] *Gopalan* v. *Madras*, A.I.R. 1950 S.C. 27.
[78] *Iswari Prasad* v. *Sen*, A.I.R. 1952 Cal. 273.
[79] *Railways Act*, 1890, s. 117.
[80] Official Secrets Act, 1923, s. 3.
[81] *N. B. Khare* v. *Delhi*, A.I.R. 1950 S.C. 211.
[82] *Gurbachan Singh* v. *Bombay*, A.I.R. 1952 S.C. 221.
[83] C.P. Goondas Act, 1946.

on the ground that the definition of "*goonda*" was not sufficiently precise.[64]

The reference to the Scheduled Tribes is intended to save the extraordinary laws applicable in territory inhabited by them and intended to protect them from exploitation by more sophisticated citizens. Such laws usually provide for expulsion of a non-member of the tribe without giving reasons. They also forbid a non-member of the tribe to acquire property in the tribal area. The Rights of residence and to deal with property are also subject to reasonable restrictions in the interest of Scheduled Tribes. Though drastic, these restrictions have been held reasonable.[65]

Freedom of Residence

All citizens have the Right to reside and settle in any part of India, *subject to similar restrictions as to the Right* of movement.[66]

Laws providing for expulsion discussed in relation to the Right of movement are also liable to avoidance as inconsistent with the Right of residence and in similar circumstances.

But this Right assumed importance in relation to expulsion from India. The Influx from Pakistan (Control) Act, 1949, empowered the Central Government to direct the removal from India of any person who had committed an offence under the Act, such as *entering India* without a passport or with an invalid passport or breaking the conditions of an entry permit, or who was reasonably suspected of having committed such offence. Such removal would, in effect, deprive a citizen of his citizenship, only permissible on a law made by Parliament for that purpose.[67] The provision for expulsion on suspicion, without opportunity to show cause, was not a reasonable restriction on the Right.[68] But a penal provision[69] for entering India without a valid passport was held valid.[70]

Right to Follow an Avocation

All citizens have the Right to practice any profession, to carry on any occupation, trade or business.[71] This may be restricted in the interest of the general public, and the State may make laws relating to:

[64] *State of M.P. v. Baldeo Prasad*, A.I.R. 1961 S.C. 293.
[65] *Thattikarantavila v. Inland Inspection Officer*, A.I.R. 1957 Mad. 433.
[66] Art. 19 (1) (*e*) and (5).
[67] Under Art. 11.
[68] *Ebrahim Vazir v. Bombay*, A.I.R. 1954 S.C. 229.
[69] Passport Rule 13 under Passport Act, 1920.
[70] *Abdul Rahim v. Bombay*, A.I.R. 1959 S.C. 1315.
[71] Art. 19 (1) (*g*).

(i) the professional and technical qualifications necessary for practising any profession or carrying on any occupation, trade or business;

(ii) the carrying on by the State or a State-owned or State-controlled corporation of any business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.[92]

It is now impossible to challenge acts of government nationalising a trade or service. Power to carry on a trade or business and to acquire property for that purpose is within the executive power of the Union and State Governments.[93] Unless the scheme involves interference with existing Rights, no special legislation is necessary.[94]

Lawyers,[95] practitioners of western medicine,[96] and nurses[97] are subject to statutes restricting their Right to practise their professions and providing for discipline and disqualification, which seem to come within the permissible restrictions on the Right. With the advance of technology, similar progressive regulation of practitioners in other fields may be anticipated.

The Right does not extend to activities regarded by the reasonable man as pernicious or anti-social. While it is permissible to promote a competition involving a substantial exercise of skill, promotion of gambling is not protected by the Right[98]; nor are dealing in liquor,[99] acting as a lawyer's tout,[1] and trafficking in women.[2] The courts seem disposed to allow more scope for the restrictive powers of the State than in relation to other Rights. The Imports and Exports Control Act, 1949, empowers the Union by order to prohibit, restrict or control, in all or specified cases or classes of cases, or subject to exceptions, the import or export of any goods; contravention of any such order is punishable with fine or imprisonment. In exercise of these powers the import of soda ash was canalised through two importers, who were obliged to maintain stocks at convenient centres and sell at fixed prices. This was held to be a reasonable restriction in the public interest because the import and export policy must be flexible; the orders must be periodically adjusted, having regard to the foreign exchange situation and the need to protect national industries.[3]

[92] Art. 19 (6).
[93] Art. 298.
[94] *Ram Jawaya* v. *Punjab*, A.I.R. 1955 S.C. 549.
[95] Legal Practitioners Act, 1879; Bar Councils Act, 1926; Advocates Act, 1961.
[96] Medical Councils Act, 1956; Medical Degrees Act, 1916.
[97] *Nursing Council Act, 1947.*
[98] *Chamarbaugwalla* v. *Union*, A.I.R. 1957 S.C. 628.
[99] *Cooverjee* v. *Excise Commissioner*, A.I.R. 1954 S.C. 220.
[1] *In the matter of Phool Din*, A.I.R. 1952 All. 491.
[2] *Cooverjee (supra).*
[3] *Bhatnagars* v. *Union*, A.I.R. 1957 S.C. 473.

Similar powers were given to the Union in relation to the production and distribution of certain commodities in short supply, *viz.*, textiles, cotton, paper, foodstuffs, cattle-fodder, coal, iron, steel and mica by the Essential Supplies (Temporary Provisions) Act, 1946. An order made under this Act gave the East India Cotton Association the monopoly of making forward contracts in cotton. When a rival association complained, it was said that in certain circumstances total prohibition of normal trading would be reasonable. Supervision of forward contracts in cotton was essential to protect growers, manufacturers and merchants from speculators. The rival association had neither the experience nor the reputation to claim to stand on the same footing as the monopolist.[4] But a monopoly in goods not normally in short supply, such as wholesale trade in vegetables, is unconstitutional.[5]

Orders made under the Essential Supplies Act often introduced a licensing system for traders and producers. A licence is not a privilege in India; even in regard to commodities governed by the Act, licensing cannot be left to the unguided discretion of officials: there is a duty to act judicially and to observe the rules of natural justice in refusing or cancelling licences.[6] There is no constitutional objection to a licensing system for any class of goods, provided that it is in the public interest, *e.g.*, when the object is to prevent evasion of sales tax or to ensure single-point taxation.[7]

Persons pursuing dangerous trades must put up with special restrictions. An opium vendor cannot complain of the discretion given to the excise officer to decide from which vendor a consumer may purchase his opium,[8] nor can a prospective dealer in explosives complain of the discretion given to the district magistrate to refuse him a licence.[9]

The fact that the cow is sacred to Hindus and protected by a Directive Principle,[10] while Muslims are beef-eaters, has caused special difficulties for butchers. A law forbidding the establishment of a cattle-market is void,[11] but a law restricting the slaughter of cattle was held valid in so far as it prohibited the slaughter of cows of any age, and calves of cows and buffaloes, and in so far as it required certificates for the slaughter of bulls and buffaloes, but it

[4] *M.B. Cotton Association* v. *Union*, A.I.R. 1954 S.C. 634.
[5] *Rashid Ahmed* v. *Municipal Board*, A.I.R. 1950 S.C. 163.
[6] *Dwarka Prasad* v. *U.P.*, A.I.R. 1954 S.C. 224.
[7] *Guruviah* v. *Madras*, A.I.R. 1958 Mad. 158.
[8] *Arjan Das* v. *Punjab*, A.I.R. 1958 Punj. 400
[9] *Allahnoor* v. *Chittargarh*, A.I.R. 1956 Raj. 153.
[10] Art. 48.
[11] *Tahir Hussain* v. *District Board*, A.I.R. 1954 S.C. 630.

was void in so far as it prohibited the slaughter of buffaloes, breeding bulls and working bullocks, regardless of age or usefulness.[12]

Trade union and labour welfare legislation is generally a reasonable restriction in the public interest because it promotes industrial tranquillity, but a provision[13] that an employee who voluntarily resigns after three years must be given a gratuity,[14] and a provision,[15] empowering the Union to decide, without giving reasons, whether an employer operated in a scheduled industry with at least fifty employees so as to be obliged to maintain an employees' provident fund, was held unreasonable.[16]

Fundamental Rights in Property

All citizens have the Right to acquire, hold and dispose of property, subject to reasonable restrictions in the interest of the general public or a Scheduled Tribe.[17]

No person shall be deprived of property save by authority of law.

No property shall be compulsorily acquired or requisitioned save for a public purpose and by authority of a law which provides for compensation and either fixes the compensation or specifies principles for its determination; no such law shall be called in question in any court on the ground that the compensation provided by that law is inadequate.

No such law made by a State shall have effect unless assented to by the President.

Where a law does not provide for the transfer of ownership or the right to possession to the State or a State-owned or State-controlled corporation, it shall not be deemed to provide for its compulsory acquisition, notwithstanding that it deprives a person of his property.

The restrictions on compulsory acquisition do not apply to pre-Constitution laws, laws imposing taxes or penalties, laws for the promotion of public health and prevention of danger to life or property and to evacuee property laws.[18]

Whereas the Fundamental Rights, as originally enacted, were based on liberal concepts, the Directive Principles are mainly *socialistic*, and it is not a matter for surprise that conflict between them arose in regard to property rights. Congress was committed to a policy of breaking up the large agricultural estates and other

[12] *M. H. Quareshi* v. *Bihar*, A.I.R. 1958 S.C. 731.
[13] In the Working Journalists Act, 1955.
[14] *Express Newspapers* v. *Union*, A.I.R. 1958 S.C. 578.
[15] In the Employees' Provident Funds Act, 1952.
[16] *Bharat Board Mills* v. *E.P. Fund Administrator*, A.I.R. 1957 Cal. 702.
[17] Art. 19 (1) (*f*) and (5).
[18] Art. 31.

forms of nationalisation. Much of the legislation to implement this would have been repugnant to Article 31 had not Articles 31A and 31B been enacted.[19] The former protects from avoidance for inconsistency with the Rights in Property and to equal protection of the laws any law whereby the State acquires estates in land, assumes temporary management of property, amalgamates companies, extinguishes rights of a company's officers or modifies miner's and prospector's rights. The latter gives *ad hoc* constitutional validity to twenty statutes.

The Constitution (Seventeenth Amendment) Bill proposes to amend Article 31A so as to empower Government to acquire any category of interest in land by a law which will be protected from avoidance for repugnancy to Articles 14, 19 and 31. The object of earlier inroads into the Right to compensation for expropriation was to expedite the expropriation of agricultural landlords for the benefit of the *ryot*, but the proposed amendment will expose the *ryot* to the danger of expropriation without adequate compensation and appears to adumbrate an entirely new agricultural policy. A large increase in the number of expropriatory statutes given *ad hoc* constitutional validity also appears to be imminent. This will considerably contract the field under the protection of Article 31; very little will be left of the original constitutional protection of property rights.

The paraphrase of Article 31 above represents it as amended.[20] It had been held that, as originally enacted, if a person had been deprived of his property, Article 19 (1) *(f)* had no application, but that Article 31 protected him from deprivation in any way whatever, except under a law, which compensated him to the market value of his property.[21] As the amendment is not retrospective this applies to expropriation preceding it.

Property in the present context means not only tangible property but also any bundle of rights which the owner can exercise to the exclusion of others, such as a rentcharge or a mortgage. Individual rights in such a bundle, such as a shareholder's right to vote at a company's meeting, are not property unless recognised by law as susceptible of distinctive acquisition or possession.[22] The interest of a *mohant*[23] and a *shebait*[24] in the property of the *math*[25] and the temple property respectively,[26] and a heritable office not held at

[19] Constitution (First Amendment) Act, 1951, and Constitution (Fourth Amendment) Act, 1955.
[20] By the Constitution (Fourth Amendment) Act, 1955.
[21] *Dwarkadas* v. *Sholapur S. & W. Co.*, A.I.R. 1954 S.C. 119.
[22] *Chiranjit Lal* v. *Union*, A.I.R. 1951 S.C. 41.
[23] The Director of a Hindu theological college.
[24] The manager of a temple.
[25] A Hindu theological college.
[26] *Commissioner* v. *Swamiar*, A.I.R. 1954 S.C. 282.

another's pleasure[27] are property, but the right to enjoy land free of liability to land revenue[28] and the bare right of management of the governing body of a society[29] are not property.

There is no guarantee that what have previously been legitimate objects of property, such as liquor or opium, shall continue to be so regarded.[30] Where a property right is created by statute, it can only be held subject to the conditions imposed by that statute.[31]

Any restraint short of total deprivation will come within the purview of Article 19 (1) (f) and will be permissible if it is reasonable and in the public interest. While provisions of the Bombay Prohibition Act, 1949, generally prohibiting possession and purchase of alcoholic liquor were held valid, similar provisions relating to non-potable alcohol, medicines and toilet preparation, intended to prevent their misuse so as to defeat the object of the statute, were held void, for they prohibited the legitimate use of these things.[32]

Owing to the housing shortage after Hitler's war, most States enacted rent restriction legislation, providing for the fixing of fair rents and restricting evictions. These are obviously restrictions in the public interest and they are only liable to avoidance for unreasonableness. The fact that the landlord can only make a small profit does not make such legislation unreasonable[33]; a provision whereby the landlord may ask for eviction when rent is three months in arrears unless the tenant either deposits the rent or furnishes security within fifteen days is reasonable.[34]

Regarding agricultural tenancies it has been said that the Right only contemplates the recovery of a fair rent, so that legislation to fix fair rents is no invasion of the Right. Exclusion of bumper and famine years in making the estimate is reasonable.[35] A contention that provisions for extending a tenant's term would only be reasonable to meet an emergency in relations between landlords and tenants has been rejected.[36]

Legislation has been enacted in some States to provide for the supervision of Hindu religious endowments. The Madras Hindu Religious and Charitable Endowments Act, 1951, set up a large organisation under a commissioner with wide powers. Such legislation can only be assailed on the ground of unreasonableness, and the

[27] *Purshothom v. Venkatappa*, A.I.R. 1952 Mad. 150.
[28] *Girijananda v. Assam*, A.I.R. 1956 Assam 33.
[29] *P.B.N. College Committee v. A.P.*, A.I.R. 1958 A.P. 773.
[30] *Sheoshanker v. M.P.*, A.I.R. 1951 Nag. 58.
[31] *K. C. Nambiar v. Madras*, A.I.R. 1953 Mad 351.
[32] *State of Bombay v. Balsara*, A.I.R. 1951 S.C. 318.
[33] *Iswari Prasad v. Sen*, A.I.R. 1952 Cal 273.
[34] *Haraiswar Singh v. Satyendra*, A.I.R. 1957 All. 305.
[35] *Kishan Singh v. Rajasthan*, A.I.R. 1955 S.C. 795
[36] *Subramania v. Dharmalinga*, A.I.R. 1955 Mad. 608.

greater part of the statute was upheld, but provisions calculated to hinder a *mahant* discharging his spiritual functions, compelling him to spend surplus income as directed by the commissioner, to apply personal gifts to purposes of the *math* and forbidding him to spend money on religious propaganda were held unreasonable.[37] Another statute[38] permitted the commissioner, with the approval of the court, to divert trust property, if he thought the object prescribed by the settlor undesirable. It was held that any inroad into the right to dispose of property on trust, not within the ambit of the *cy-près* doctrine, was unreasonable.[39]

The Right has been pleaded against the right of pre-emption, the right of certain persons with prescribed interests in immovable property to purchase it at the price agreed by the owner and a purchaser. It has been held to be reasonable when exercised by a co-owner in relation to agricultural land,[40] but not when exercised by an adjoining owner in an urban area.[41]

Turning now to the Rights in relation to expropriation, the first clause of Article 31 protects all persons from being deprived of their property save by authority of law. This only applies to deprivations by the State. The law must be constitutionally valid. Nobody can complain if his property is seized in execution of a warrant in accordance with the procedure laid down by statute,[42] but seizure by the police in circumstances not justifiable by law give him an immediate right to a writ to protect his Right.[43]

The second clause must now be read disjunctively from the first. A law authorising expropriation need only provide for compensation when title or right to possession is transferred to the State or a State owned or controlled corporation. The amount of compensation is a matter for the Legislature only. It is still possible to claim protection on the grounds that the law is unconstitutional or that the acquisition or requisition is not for a public purpose or that the provisions relating to compensation are illusory or that, instead of laying down principles for determining the amount of compensation, the statute leaves the matter to the untrammelled discretion of the Executive.

In this context "public purpose" means what favours the general interest of the community as opposed to the particular interest of the individual; an acquisition scheme must be considered as a whole, not

[37] *Commissioner* v. *Swamiar*, A.I.R. 1954 S.C. 282.

[38] The Bombay Public Trusts Act, 1950.

[39] *Ratilal* v. *Bombay*, A.I.R. 1954 S.C. 388 The *cy-près* doctrine permits the diversion of trust property by the court to a purpose as near as possible to that prescribed by the founder, if it is impossible to carry out the original object.

[40] *Ram Rakh* v. *Mt. Gulab*, A.I.R. 1957 Raj. 140.

[41] *Kesar Devi* v. *Nanak Singh*, A.I.R. 1958 Punj. 44

[42] *Sharma* v. *Satish*, A.I.R. 1954 S.C. 300.

[43] *Wazir Chand* v. *H.P.*, A.I.R. 1954 S.C. 415.

struck down because a particular item cannot be supported.[44] A scheme to provide houses for individuals is not liable to condemnation on the ground that it favours those individuals, provided that they benefit, not as individuals, but in furtherance of a scheme to relieve housing congestion.[45]

The protection of pre-Constitution laws extends to the Land Acquisition Act, 1894, which is extensively used when property is needed for Government purposes and which provides an elaborate procedure for determination of the compensation by judicial process.

One difficulty which has faced the courts is the partition of the protection of the right to property between Articles 19 (1) (*f*) and 31. At first it was held that, if a person had been expropriated, Article 31 alone was relevant; Article 19 (1) (*f*) could only apply if he retained some rights in his property. But it has not been possible to maintain this position since the amendment of Article 31 in 1955. The position now adopted is that, as Article 31 (1) forbids expropriation save by authority of law and as Article 13 (2) makes a law abridging a Fundamental Right no law at all, an expropriatory law repugnant to Article 19 (1) (*f*) violates Article 31 (1).[46] Even a taxing Act will be void if it abridges a Fundamental Right; if it prescribed no machinery for assessment of a tax, leaving it to the Executive to perform this function as it thought fit, it might be struck down as an unreasonable restriction on the right to hold property.[47]

Right to Life and Liberty

No person shall be deprived of life or personal liberty except according to procedure established by law.[48]

This does little more than protect the individual from arbitrary execution or arrest at the discretion of the Executive. "Procedure established by law" does not import the American concept of "due process."[49] "Law" in this context would presumably cover the execution of a person by martial law, when justified by the necessities of the situation but, that apart, the procedure followed must be in accordance with a law, not violative of any other constitutional limitation.

A complaint of kidnapping a minor girl from lawful guardianship was made to a magistrate, who issued a warrant to arrest the accused and a search warrant for the production of the girl. When the accused was arrested, the girl represented to the court of session that

[44] *State of Bihar* v. *Kameshwar Singh*, A.I.R. 1952 S.C. 252.
[45] *Padayachi* v. *Madras*, A.I.R. 1952 Mad. 756.
[46] *K. K. Kochunni* v. *Madras*, A.I.R. 1960 S.C. 1080.
[47] *Jagganath Baksh* v. *U.P.*, A.I.R. 1962 S.C. 1563.
[48] Art. 21.
[49] *Gopalan* v. *Madras*, A.I.R. 1950, S.C. 27.

she was twenty-two and married to him, so he was released on bail. But as she left the court, she was arrested and taken to the magistrate, who committed her to gaol for medical examination as to her age and "to prevent a breach of the peace." This was held to be an infringement of the Right. A magistrate may issue a search warrant *for the production of a person wrongfully confined and*, when she is produced "make such order as in the circumstances of the case seems proper,"[60] but that does not empower him to deprive the girl of her liberty. He may also restore a female minor to her parents,[61] but the girl was prima facie not a minor. A person likely to commit a breach of the peace may be called upon to furnish security[62] but cannot be committed to gaol out of hand.[63]

Protection against Conviction

No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act nor subjected to a greater penalty than might have been inflicted under a law then in force.[64]

The ban on retroactive legislation is confined to substantive penal laws. A person is triable by the procedure in force when he is tried, not that in force when he committed the offence.[65] Penalties or disabilities other than conviction, *e.g.*, eviction from public property,[66] *or enhancement of a period of preventive detention*,[67] may be imposed by a retroactive law. The Madras Buildings (Lease and Rent Control) Act, 1949, as originally enacted, provided fine or imprisonment on conviction of occupation of premises in breach of the Act; an amendment provided, in addition, for summary eviction. The retroactive nature of the amendment was held not to violate the Right.[68]

No person shall be prosecuted and punished for the same offence more than once.[69]

"Prosecution" means a proceeding either by indictment or on information in a criminal court to put an offender on trial.[70] Protection is only given when there has previously been prosecution and punishment for the same offence before a court. If a government servant has been dismissed for corruption by Government on the

[60] Code of Criminal Procedure, 1898, s 100.
[61] *Ibid.* s. 552.
[62] *Ibid.* s. 100.
[63] *Lilmani Devi* v. *State*, A.I.R. 1957 Pat. 689.
[64] Art. 20 (1).
[65] *Shiv Bahadur* v. *U.P.*, A.I.R. 1953 S.C. 394.
[66] *Brij Bhukan* v. *S.D.O.*, A.I.R. 1955 Pat. 1.
[67] *Pralhad* v. *Bombay*, A.I R. 1952 Bom. 1.
[68] *Fathima* v. *Madras*, A.I.R. 1953 Mad. 257.
[69] Art. 20 (2).
[70] *Thomas Dana* v. *Punjab*, A.I.R. 1959 S.C. 375.

report of a commissioner who has held an inquiry under the Public Servants' Inquiries Act, 1850, he cannot plead this in bar of a criminal prosecution, for the commissioner is not a court.[41] Disabilities imposed on a pleader under the Legal Practitioners Act, 1879, for misconduct are no bar to his prosecution on the same facts.[42]

In the case of a continuing offence, such as failing to provide amenities at a pithead by a prescribed date, a previous conviction will not bar a fresh trial for continuing failure after the relevant date in the first trial.[43]

No person accused of any offence shall be compelled to be a witness against himself.[44]

"To be a witness" means to furnish evidence and includes the production of any evidentiary material. The ban applies to any process to compel a person to produce such material, not only when he is on trial but also as soon as a formal accusation of an offence has been made, which, in the ordinary course of events, will result in his prosecution. There is, however, no constitutional guarantee against search and no objection to the use of incriminating material seized without the co-operation of the accused.[45]

In India a witness cannot object to answering a question on the ground that it might incriminate him.[46] An official of a banking company may, on the report of the official liquidator, be required to submit to a public examination and is obliged to answer truly; his answers may be used against him if he is subsequently prosecuted,[47] but it has been held that there is no violation of the Right because it does not extend to civil proceedings.[48]

A person arrested on a charge involving intoxication cannot complain if a doctor examines him and takes a note of his symptoms, which is subsequently given in evidence. If a person swallows an incriminating article, it can be extracted and used as evidence. He can be put on an identification parade.

The courts are not unanimous on the question whether a person's thumb impression can be taken and whether he can be compelled to furnish a sample of his handwriting. The former can be secured without his co-operation but the latter cannot; if this is the true criterion of whether the protection exists or not, it would seem that he cannot be compelled to furnish the latter.

[41] *Venkataraman v. Union*, A.I.R. 1954 S.C. 375.
[42] *Re Devanugraham*, A.I.R. 1952 Mad. 725.
[43] *G. D. Bhattar v. State*, A.I.R. 1957 Cal. 483.
[44] Art. 20 (3).
[45] *Sharma v. Satish*, A.I.R. 1954 S.C. 300.
[46] Evidence Act, 1872, s. 132.
[47] Banking Companies Act, 1949, s. 45G.
[48] *Suryanarayana v. Vijaya Commercial Bank*, A.I.R. 1958 A.P. 756.

Protection against Arrest and Detention

No person who is arrested shall be detained in custody without being informed as soon as may be of the grounds of his arrest nor shall he be denied the right to consult and be defended by a legal practitioner of his own choice.[69]

"As soon as may be" means with reasonable promptitude in the circumstances. As the object *is to enable the arrestee to consider* his position, and move for habeas corpus or apply for bail or prepare his defence, he must be given sufficient information to enable him to understand why he has been arrested. It is not enough to say "You have been arrested under section 7 of the Criminal Law Amendment Act."[70] The accused has the right to consult his pleader out of the hearing of the police at such times and in such circumstances as are convenient to the public authorities and other persons involved.[71] Some railway porters obstructed the running of a railway and were arrested. Some of them were tried in the prison next day and the remainder on the following day. They were not informed of the date of the trial, nor of their Right to be defended by a pleader. It was held that the Right had been infringed and their convictions were set aside.[72]

Every person who is arrested and detained in custody shall be produced before the nearest magistrate within twenty-four hours, excluding the time necessary for the journey from the place of arrest to the magistrate's court and no such person shall be detained beyond the said period without the authority of a magistrate.[73]

The protection only applies to a person arrested without a warrant on a criminal charge; the object is to ensure that a judicial mind is applied to the legal authority of the person making the arrest and the regularity of the procedure.[74]

The Rights in Article 22 (1)–(3) considered above do not apply to enemy aliens or persons preventively detained.

Protection of Persons Preventively Detained

Preventive detention is recognised by the Constitution and legislative power in relation to it is distributed between the Union and Concurrent List[75]; the whole field is at present covered by the Preventive Detention Act, 1950. Any Government, if satisfied that it is necessary to prevent a person acting to the prejudice of the security

[69] Art. 22 (1).
[70] *Tarapada De v. W. Bengal*, A.I.R. 1951 S.C. 174.
[71] *Moti Bai v. Rajasthan*, A.I.R. 1954 Raj. 241.
[72] *Hansraj v. U.P.*, A.I.R. 1956 All. 641.
[73] Art. 22 (2).
[74] *Punjab v. Ajaib Singh*, A.I.R. 1953 S.C. 10.
[75] Sched. 7, List 1, item 9; List 3, item 3.

of India may order him to be detained. If satisfied that an order is necessary to prevent a person acting to the prejudice of the safety of a State or the maintenance of public order or maintenance of essential supplies and services, any Government, any district magistrate and certain others may make it. No offence is proved, no charge formulated; the justification is reasonable probability and not conviction warranted by legal evidence. An order is made on the subjective satisfaction of government or an authorised official that it is necessary for reasons connected with the factors enumerated. A court cannot substitute its own judgment on the expediency of the order.[76]

When any person is detained in pursuance of an order under a preventive detention law, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and afford him the earliest opportunity of making a representation against the order. The authority making the order shall not be required to disclose facts which such authority considers to be against the public interest to disclose.[77]

"Grounds" are conclusions as to the détenu's activities drawn from the information furnished to the detaining authority; facts are particulars in the information supporting the grounds. The courts cannot question the view of the authority as to whether the withholding of facts is in the public interest.[78]

But a détenu is entitled to his release if there is unreasonable delay in furnishing grounds and also if there is no rational connection between the grounds and the professed object of the order. Persons were detained to prevent them acting to the prejudice of public order on the ground that they had distributed pamphlets accusing the Chief Justice of the State of corruption; they were released because, though their conduct might tend to undermine confidence in the administration of justice, it could not endanger public order.[79]

A détenu is also entitled to release if the grounds are not presented in such a form as to enable him to make his representation. The precision of a criminal charge is not necessary but the grounds must indicate with reasonable clarity what the authority has against him. "In pursuance of the Communist policy you are preparing the masses for a violent revolutionary campaign and attend secret meetings to give effect to that programme" is too vague[80], "that your

[76] *Gopalan v. Madras*, A.I.R. 1950 S.C. 27.
[77] *Art.* 22 (4) and (5).
[78] *State of Bombay v. Atma Ram*, A.I.R. 1951 S.C. 157.
[79] *Sodhi Shamher Singh v. Punjab*, A.I.R. 1954 S.C. 276.
[80] *Ujagar Singh v. Punjab*, A.I.R. 1952 S.C. 350.

speeches, generally in the past and particularly in August 1950 at public meetings in Delhi, have been such as to excite disaffection between Hindus and Muslims and thereby prejudice the maintenance of public order" is adequate.[61]

A détenu is also entitled to his release if the order of detention is made mala fide or if it is made for a purpose not contemplated by the Statute.

No law providing for preventive detention shall authorise the detention of a person for longer than three months unless an advisory board, consisting of persons who are or have been or are qualified to be appointed as judges of a High Court, has reported before the expiry of that period that there is sufficient cause for such detention.[62]

Parliament has power to prescribe maximum periods of detention and also classes of détenus who may be subjected to prolonged detention without recourse to an advisory board.[63] But under the Statute in its present form a detention order made by any authority other than a Government is only valid for twelve days and the case must be reported to the State Government forthwith. If the State confirms the order, it must be reported forthwith to the Union. The case must be referred to the advisory board within thirty days of the order. The advisory board has power to call for any information it wishes but the détenu has no right of audience. No person can be detained for more than twelve months.

Rights against Exploitation

Traffic in human beings, *begar* and similar forms of forced labour are prohibited, but the State may impose compulsory service for public service, provided it does not discriminate on grounds only of religion, race, caste, or class or any of them.[64]

Begar is the carrying of loads and similar work of a manual kind, professedly in the public service. "Traffic in human beings" includes traffic in women and children for immoral purposes.[65] Railway porters agreed to do extra work in consideration of extra remuneration, a reduced licence fee and the right to use the railway premises for their work gratis. This was held not to be forced labour.[66]

"Compulsory service for public purposes" includes conscription for defence but not, in normal times, impressing men by a government

[61] *Ram Singh v. Delhi*, A.I.R. 1951 S.C. 270.
[62] Art. 22 (4).
[63] Art. 22 (7).
[64] Art. 23.
[65] *Raj Bahadur v. Legal Remembrancer*, A.I.R. 1953 Cal. 522
[66] *Dubar v. Union*, A.I.R. 1952 Cal. 496.

servant to carry loads of government property.[37] It covers requiring bus owners to collect a tax imposed on passengers.[38]

No child under fourteen shall be employed in any factory, mine or other hazardous employment.[39]

Freedom of Conscience and Religion

Subject to public order, morality and health and to the other Fundamental Rights, all persons are equally entitled to freedom of conscience and freely to profess, practise and propagate religion. But this does not affect any law regulating any economic, financial, political or other secular activity associated with religious practice or providing for social welfare or reform or the throwing open of public Hindu religious institutions to all classes of Hindus.[40]

"Religion" in this context need not be theistic; it includes faith, belief, religious practices, performance of acts in pursuance of religious belief, doctrines regarded as conducive to spiritual well-being, a code of ethical rules, ritual, observances, ceremonies and modes of worship; what constitutes an integral part of a religion must be ascertained from its own doctrines and no outside authority may say that a particular rite or ceremony is a secular activity not essential to the religion on the ground that it involves expenditure.[41]

Unless the State can plead public order, morality or health as justifying it, legislation interfering with religious worship is inadmissible. Provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951, empowering the Commissioner and his subordinates to enter temples in exercise of their powers of supervision, in so far as they involved entry into the holiest parts, to which the ordinary worshipper is not traditionally admitted and entry on the temple during the idol's periods of rest, when disturbance by the public is not permitted are a violation of the Right.[42] But the provisions of Chapter 5 of the Penal Code, 1860, enforcing the policy that no man may insult the religion of another are restrictions in the interest of public order.

The Right of Freedom of religion is subject to the other Rights. Religious institutions are usually endowed with secular property. It was contended that the U.P. Abolition of Zamindari Act, 1950, in so far as it affected *wakf*[43] property, was a violation of the Right to practise religion. It was held that the Right was subject to Article

[37] *State of H.P. v. Jorewar*, A.I.R. 1953 H.P. 18.
[38] *Atmar Ram v. Bihar*, A.I.R. 1952 Pat. 359.
[39] Art. 24.
[40] Art. 25.
[41] *Ratilal v. Bombay*, A.I.R. 1954 S.C. 388.
[42] *Commissioner v. Swamiar*, A.I.R. 1954 S.C. 282.
[43] Dedication by a Muslim to a religious or charitable purpose.

31 and the trusts imposed on the expropriated property would attach to the compensation received.[94] The same reasoning would govern acquisition of *debutter* property.[95]

The State may interfere with religious practice running counter to a policy of social welfare on which the State has embarked so that, notwithstanding that a strong case can be made for polygamy being necessary to a Hindu's salvation, legislation imposing monogamy on Hindus is valid.[96]

Right to Manage Religious Property

Subject to public order, morality and health, every religious denomination has the right to establish and maintain religious and charitable institutions, to manage its own affairs in matters of religion, to acquire and own property and to administer it according to law.[97]

Any sect or sub-sect with a distinctive name, common faith and spiritual organisation is a denomination; a *math* is a section of a denomination.[98]

The right of a denomination to manage its own affairs in matters of religion cannot be taken away but the right of administration of property may be regulated by law. This involves drawing a line between matters of religion and secular administration of property, to do which the court should take a common sense view and be guided by considerations of practical necessity.[99] If the tenets of a sect prescribe offerings of food to the idol at particular hours, periodical ceremonies performed in a certain way at stated times, daily recital of sacred texts and oblations to the sacred fire, the mere fact that they involve expenditure and the use of marketable commodities will not make them secular activities of a commercial character. Provisions in the Madras Hindu Religious and Charitable Endowments Act, 1951, for the maintenance of records of the property of religious institutions, for the Commissioner to make orders to ensure proper administration of the property, to ensure due appropriation of its income and requiring a *mahant* to prepare a budget, which might be modified, are valid.[1]

Freedom from Taxation to Promote Religion

No person shall be compelled to pay a tax the proceeds of which are applied for the promotion or maintenance of any religion or denomination.[2]

[94] *Suryapal Singh v. U.P.*, A.I.R. 1951 All. 674.
[95] The secular property forming the endowment of a Hindu religious institution.
[96] *State of Bombay v. Narasu*, A.I.R. 1952 Bom. 84.
[97] Art. 26.
[98] *Commissioner v. Swamiar*, A.I.R. 1954 S.C. 282.
[99] *Ratilal v. State*, A.I.R. 1954 S.C. 388.
[1] *Commissioner v. Swamiar*, A.I.R. 1954 S.C. 282
[2] Art. 27.

The Madras Hindu Religious and Charitable Endowments Act, 1951, imposed a tax, being a percentage of the income of religious endowments to meet the expenses of the Endowments Board. The Madras High Court held that it was an infringement of the Right but the Supreme Court reversed this, pointing out that the object was not to foster or preserve the Hindu religion but to ensure proper administration of religious institutions.[3]

Religious Instruction in Schools

No religious instruction shall be provided in any educational institution wholly maintained out of State funds other than an educational institution administered by the State but established under a trust requiring religious instruction to be given there.

No person attending any educational institution recognised by the State or receiving State aid shall be required to take part in any religious instruction imparted there or to attend religious worship conducted there or in any premises attached thereto unless such person, or, if he is a minor, his guardian, has consented thereto.[4]

Cultural Rights of Minorities

Any section of citizens residing in India and having a distinct language, script or culture of its own shall have the Right to conserve the same. No citizen shall be denied admission into any educational institution maintained by the State or receiving State aid on grounds only of religion, race, caste, language or any of them.[5] The Bombay Government forbade State-aided schools using English as the medium of instruction to admit pupils other than Anglo-Indians or citizens of non-Asiatic descent. The object was to encourage the use of Hindi, but it bore heavily on the Anglo-Indian schools, most of whose pupils were Indians. It was held that the Anglo-Indians had a distinct language, English, which they had a Right to conserve. The order of the Bombay Government, in effect, forbade Indians to enter the schools on grounds of race and language which the Constitution did not permit.[6] The omission of residence and place of birth as forbidden grounds enables a minority to establish a school in a backward area and restrict admission to residents. An order allotting vacancies in government colleges in fixed proportions among Anglo-Indians, Muslims, and different classes of Hindus is not permissible,[7] but special provisions for backward citizens are allowed.

[3] *Commissioner* v. *Swamiar*, A.I.R. 1954 S.C. 282.
[4] Art. 28.
[5] Art. 29
[6] *State of Bombay* v. *Bombay Educational Society*, A.I.R. 1954 S.C. 561.
[7] *Dorairajan* v. *Madras*, A.I.R. 1951 Mad. 120.

All minorities, whether based on religion or language, have the Right to establish and administer educational institutions of their choice and the State shall not, in granting aid, discriminate against an institution on the ground that it is under the management of such a minority.[8]

This does not apply to minorities based on a principle other than religion or language, such as caste. It must be a minority in the region in which the institution is situated. The institution must have been established by such a minority; merely because the majority of the students belong to a minority, the minority cannot demand the Right of administration.[9] It is not for the State to determine the language of instruction in such institutions.[10] There is no limitation on the subjects to be taught but the Right to administer does not extend to the right to maladminister and the State can make the educational standard a condition on which grants will be given.[11]

The Directive Principles

The Directive Principles set out a number of objectives to guide legislative and executive policy. They are not enforceable in a court but a study of the legislation of the Indian Legislatures since independence will reveal that Indian Ministers have discharged their constitutional duty to apply the principles when sponsoring legislation. The principles are not without importance in the courts; some Fundamental Rights may be restricted in the public interest; if the object of a restriction is to attain any objective included in the Directive Principles, no one can be heard to say that it is not in the public interest.

Dealing first with internal matters, the State is required to promote the welfare of the people by creating and maintaining a social order in which social, economic and political justice shall inform all institutions.[12] Expanding the concept of social justice, the State is enjoined to organise village *panchayats* and give them such powers as to make them efficient units of self-government[13]; it must endeavour to secure a uniform civil code[14]; it must try to provide, within ten years of the commencement of the Constitution, free compulsory education up to the age of fourteen[15]; it must promote

[8] Art. 30.
[9] *Ramani Kanta v. Gauhati University*, A.I.R. 1951 Assam 163.
[10] *State of Bombay v. Bombay Educational Society*, A.I.R., 1954 S.C. 561.
[11] *Re Kerala Education Bill*, A.I.R. 1958 S.C. 956.
[12] Art. 38.
[13] Art. 40.
[14] Art. 44.
[15] Art. 45.

with special care the educational and economic interests of the weaker sections of the people, in particular the scheduled castes and tribes and protect them from social injustice and exploitation[16]; it must raise the level of nutrition and standard of living and improve public health; it must try to prohibit the use of liquor and drugs, except for medicinal purposes.[17] By way of securing economic justice, the State must endeavour to secure that all citizens have the right to an adequate means of livelihood, that control of material resources are distributed so as best to serve the common good, that the economic system does not operate so as to concentrate wealth and means of production to the common detriment, that there is equal pay for equal work for men and women, that the health of the workers and children is not abused, that people are not forced to do work unsuited to their age and strength and that children and young people are protected against exploitation and moral and material abandonment.[18] The State must secure just and humane conditions of work and maternity relief[19]; it must try to secure a living wage and working conditions ensuring a decent standard of living, full enjoyment of leisure and social and cultural opportunities; it must promote cottage industries.[20]

The State must also try to organise agriculture and animal husbandry on modern scientific lines, take steps to improve breeds and prohibit the slaughter of cows, calves and other milch and draught cattle.[21] The State must protect monuments, places and objects of artistic or historic interest declared to be of national importance.[22] It must also take steps to separate the Judiciary from the Executive.[23]

In the international sphere the State must promote international peace and security, maintain just and honourable relations between nations, foster respect for international law and treaty obligations and encourage settlement of international disputes by arbitration.[24]

[16] Art. 46.
[17] Art. 47.
[18] Art. 40.
[19] Art. 42.
[20] Art. 43.
[21] Art. 48.
[22] Art. 49
[23] Art. 50.
[24] Art. 51.

PART TWO

THE INDIAN LEGAL SYSTEM

CHAPTER 12

OUTLINE OF THE DEVELOPMENT OF THE LEGAL SYSTEM

Why has there been a "Reception" of English Law in India?

Unless one is a confirmed believer in the view that the Law of England is the

"true embodiment
Of everything that's excellent"

it may be a matter for surprise that India, now mistress of her own destinies, should be willing to retain the law, legal system, and the institutions which Britain imposed on her. One may too readily be disposed to consider that, after all, India may have more affection for England than Indians have, at times, expressed themselves as feeling, but the explanation of the "reception" of English law in India, despite the existence of an indigenous system, and an earlier imported system, is not that Indians have any inordinate affection for Englishmen, or their laws and institutions; it is an illustration of the working of certain historical laws.

Innumerable examples in history show that neither national nor any analogous sentiment is offended by the adoption of the laws and institutions of other peoples. In so far as a people has no written law, no *effective tribunals to enforce law, and no effective Legislatures* to enact new laws, it will readily absorb foreign laws. This can be *demonstrated by the reception of the Roman Law in Continental* Europe. When the British first seized the sceptre in India, there were *no effective Legislatures, the tribunals were inadequate,* and there was a dearth of legal principles. Where indigenous legal principles were available in writing, and could be applied to the problems the age set the courts, they were largely enforced in the courts which the British set up. The law of England, modified to suit local conditions, was imposed to fill up the gaps; it was accepted because there was no obvious alternative. British policy moved in the direction favoured by the historical law.

The basic principles of English law having been introduced into India to govern the dealings of one man with another in agricultural and trading communities, it was inevitable that England should supply the bases of the laws governing new activities, when transport and industry became mechanised. As the practice of settling rules

governing these matters at international conferences increased and was extended to other matters, the tendency was for new Indian laws to resemble not only the new laws of England, but the new laws of the Western world.

All laws in force at the inauguration of the Republic which are not expressly repealed remain in force, subject to necessary adaptation, until repealed or amended, except in so far as they are inconsistent with the Constitution.[1] Most of the general body of law built up during the British period remains intact; it has survived scrutiny for repugnancy to the Fundamental Rights and the Legislatures have shown no anxiety to interfere with its basic principles. But inevitably in a country with a codified system of law, Indian Legislatures have always devoted a remarkable amount of attention to lawyer's law, so that the Central and State Statute Books have grown considerably in size since independence. In a book of this kind it is impossible to give even the barest outline of the law of India; one can do no more than explain how the basic statutes have taken their present form and indicate general trends of development.

The Law in the East India Company's Factories

When the East India Company's factories were established in India, a succession of charters empowered the Governor and Council in each settlement to judge all persons under them according to the laws of England. Until 1661, when the Island of Bombay became British territory by cession under Charles II's marriage treaty with Portugal, responsibility for the administration of justice to Indians, other than servants of the Company, was not contemplated. In 1668, the island was transferred to the Company, and the charter of that year empowered it to establish a Court of Judicature, and to make laws for the island "consonant to reason, and not repugnant or contrary to, but as near as may be agreeable to the laws of England."

The laws approved by the Company's Court of Committees reached Bombay in 1670. Rights existing at the cession of the island were confirmed. Justice was to be impartial and no person was to be condemned on an important criminal charge or divested of property or any civil right save by verdict of a jury of twelve, half of whom were to be non-English if any party was non-English. There was to be a right of appeal to the Governor in Council. Justices of the peace and constables were to be appointed. Court fees were to be fixed and reasonable. Conveyances and contracts were to be

[1] Art. 372.

registered. Criminal and military offences were enumerated, and the punishments prescribed were remarkably lenient for the time.

The court was established in 1672, and, under judges with little or no legal training, functioned successfully until 1683, when the island was distracted by Keigwin's rebellion. In the following year, Dr. St. John, a civilian, was appointed Judge-Advocate in the newly established Court of Admiralty at Bombay, and assumed, by virtue of his Royal Commission, the office of Judge of Bombay. He was soon at loggerheads with the Company's officials and was dismissed in 1687. The Company's laws had disappeared during the rebellion, and in 1686 the Governor of the Company, the autocratic Sir Josiah Child, said the law in Bombay was what the King, or the Company, or the Governor-in-Council ordained; Bombay was to be ruled by the civil law and martial law. Possibly the Company's experience of the civilian Judge-Advocate extinguished any enthusiasm for the reception of the civil law, for in 1687 Sir Josiah wrote to the Judge of Bombay that his (Sir Josiah's) orders were to be the rule, and not the laws of England, which were "an heap of nonsense."

In 1689 an invasion by the Mughul Navy interrupted the proceedings of the court. Justice was administered by the Governor's Council until 1718, when the court was re-established, but there were no juries, and the judges of the court sat as a bench. They were scrupulous in requiring proof, and giving the defence a fair chance. They administered English law or its principles in so far as it was known and applicable. Points of Indian religious and customary law were referred to Indians deemed in a position to know them.

In Madras, the Company, superseding the town governor, first began to exercise judicial functions outside the sphere contemplated by the charters, by grant or sufferance of the local Prince, in 1654. In 1687, Sir John Biggs, a former recorder of Plymouth, became Judge-Advocate of the Court of Admiralty and in 1688 Recorder. His ability and his good relations with the Company created an impression favourable to the application of English law

There was no development in Bengal from the jurisdiction of the Governor-in-Council, given by the charters, until 1694, when the Company acquired, by the purchase of three villages, the status of *zamindar*, and with it the right to administer civil and criminal justice locally.

Royal Courts in the Presidency Towns

In 1726 the Company, alarmed by the attitude of the English courts, which refused to recognise the jurisdiction of its courts, condemning it in damages for intermeddling by its servants, to administer

the estates of deceased Englishmen, reversed its policy of excluding from India, to the best of its ability, officials holding Royal Commissions, and secured the establishment by Royal Charter of Mayor's Courts and Courts of Oyer and Terminer in the Presidency Towns.

This involved the authoritative introduction in the Presidency Towns of English law, including statute-law up to 1726, and immediately raised the question of jurisdiction over Indians. In 1753 the Mayor's Courts were forbidden to try actions between Indians unless they submitted to the jurisdiction, but the majority of the suitors continued to be Indians, and it was estimated that in 1731 the number of suits in Madras was comparable with that in one of the principal courts at Westminster. Company's servants without legal experience presided over the courts; most of the cases raised no difficult question of law, and were generally disposed of fairly and efficiently; the judges were guided by notes compiled by the Company's lawyers after inspection of their registers in England. The popularity of the courts with Indian litigants was presumably due in part to the efficiency of their execution proceedings.

The Muffassal Courts

The next important development was due to the necessity of restoring order in Bengal after the Battle of Plassey; this could not be done by setting up a few British courts of law to which Indians could have resort, if they were so disposed; in Bengal the Company, as *zamindar*, had never professed to administer English law. When, in 1772, under the powers vested in it by the *Diwani Grant*, it proceeded to set up courts, it did so as a feudatory of the Mughul Emperor.

Warren Hastings would seem to have exceeded the powers derived from the *Diwani* Grant in issuing his Regulation of 1772 for the Administration of Civil Justice, for it granted rights to Hindus, and deprived Muslims of privileges. Its important provision was that in suits regarding inheritance, marriage, caste, religious usage and institution, Hindus and Muslims were to have the benefit of their personal laws, which were to be expounded to the courts by the *pandits* and *maulvies*. In 1781 "inheritance" was interpreted to include succession, and it was laid down that, where no other direction was given, the court was to act according to "justice, equity and good conscience." Two fundamental principles of Indian law had then been settled.

The Collectors presided over the civil courts; appeals lay to the *Sadar Diwani Adalat*, consisting of the Governor-in-Council.

The existing system of criminal justice in Bengal was continued.

in that the law administered was the Mahommedan law, and the judges and law officers Muslims, but a criminal court was established in each district, under the superintendence of the Collector; a criminal court of appeal, the *Sadar Nizamat Adalat*, composed of Muslim officials, but under the superintendence of the Council, was also established.

The Dual System of Courts and Law

In 1773 a Supreme Court, the judges of which were English lawyers, was established in Calcutta, though with ill-defined powers and jurisdiction. Regrettable disputes with the Administration at least established the point that it would show no favour to the Administration. The Act of 1781 generally limited its jurisdiction over Indians to Calcutta, excluded from the cognisance of the court the official acts of the Governor-General in Council and matters concerning the revenue and its collection and directed the application of the personal law in questions of succession and contract when the parties were Hindus or Muslims.

The *muffassal* courts, presided over by Company's servants, the legal existence of which the Supreme Court had refused to acknowledge, received statutory recognition in the Act of 1781. There was now a dual system of courts and of law, which was extended to the other presidencies. The Bengal system was introduced in Madras in 1802 and in Bombay in 1799. The mayor's courts in Madras and Bombay were superseded by Recorders' Courts in 1797, presided over by British lawyers, and the Recorders' Courts gave way to Supreme Courts in Madras in 1801 and in Bombay in 1823. In the Presidency Towns the sphere occupied by the personal law differed from that to which it extended in the *muffassal*, and whereas, in the Presidency Towns, the residual law was the law of England, in so far as it could be applied to local conditions, in the *muffassal*, except in so far as the regulations made by the Presidency Governor applied, it was "justice, equity and good conscience."

The Supreme Courts and the Recorders' Courts which preceded them in Madras and Bombay had original civil and criminal jurisdiction within the Presidency Towns; the criminal jurisdiction of each Supreme Court also covered Britons within the Presidency in which it was situated and in Princely States in alliance with that Presidency. The criminal jurisdiction of the Calcutta Supreme Court extended to British subjects and Company's servants anywhere in Asia or Africa within the limits of the Company's trade.

The Supreme Courts exercised Admiralty jurisdiction: they could decide both civil and criminal cases arising on the high seas. Their

ecclesiastical jurisdiction included power to grant probate and to deal with administration of estates.

Courts which dealt summarily with minor civil causes had existed intermittently in the Presidency Towns before courts of requests were established by the Charter of 1753. The courts of requests had a limited pecuniary jurisdiction which was progressively enhanced. In 1848 they were placed under the superintendence and control of the Supreme Courts, and two years later they were superseded by the small cause courts. Subsequently small cause courts were set up in the *muffassal* whenever it was deemed necessary to provide the summary procedure and more rapid disposal of petty cases which distinguishes these courts.

The *muffassal* system did not remain static. In Bengal, in 1793, after change and counterchange, Lord Cornwallis, a devotee of the doctrine of separation of powers, deprived the Collectors of their judicial powers, and confined them to their revenue duties. Below the *Sadar Diwani Adalat*, four "provincial" courts of appeal were established. Below them were the district courts, presided over by judges unconnected with the revenue administration, and below them were courts with limited pecuniary jurisdiction, presided over by *Sadar Amins* and *munsiffs*.

Changes were made in the system of criminal courts, interlocking it with the system of civil courts. Civil judges had, in 1781, been given magisterial powers, and in 1790 the district criminal courts were superseded by courts of circuit, now manned by British judges, though retaining Muslim law officers. In the same year the powers of the *Sadar Nizamat Adalat* were transferred to the Governor-General's Council. In 1801 the courts of appeal and the courts of circuit were combined; the *Sadar Nizamat Adalat* and *Sadar Diwani Adalat* were separated from the Council. Their judges performed judicial functions only, and for most purposes these courts became the final courts of appeal for the *muffassal*.

Though there was little change in the law administered in the *muffassal* civil courts, the criminal law, and especially the procedural law, underwent drastic changes. Lord Cornwallis' Regulation of 1793 substantially substituted for what Britons regarded as the formal artificialities of Muslim procedure, rules in substance applicable in a Court of Session in India today, except that, before judgment, the Muslim law officer's opinion was taken. Witnesses were sworn and confined to statements of which they had personal knowledge; leading questions were forbidden, and cross-examination was allowed; confessions were to be received with caution. The right of the relatives of a victim of homicide to compound with the slayer was abrogated:

imprisonment supplanted mutilation as a punishment. The right of the Muslim law officer to lay down the substantive law applicable continued until 1810, but by 1832 the Muslim system had been so considerably amended as to show little evidence of its origin.

In 1829 Lord William Bentinck[8] abolished the courts of circuit, and appointed Commissioners to perform the functions of these courts. It was immediately evident that the Commissioner's revenue and administrative functions left him insufficient time to perform his judicial duties, and it became the practice to direct the district judge to hold sessions. In due course the district judge became known as the "district and sessions judge," and later doubts as to the legal existence of such an official were not removed until the Bengal Sessions Court Act was passed in 1871. The district judge's magisterial powers were transferred to the Collector, and the process of conferring magisterial powers upon his subordinate executive officials began.

The division of revenue and judicial powers between officials in Bengal raised the difficult question of apportioning jurisdiction over disputes between *zamindar* and occupant. The ultimate solution was to vest jurisdiction with the revenue officers during the preparation of the record of Rights, but, otherwise, disputes between landlord and tenant generally came within the cognisance of the civil courts. In other parts of India disputes between landlord and tenant of agricultural land are within the exclusive jurisdiction of revenue courts.

In Madras the development of the courts followed that in Bengal, save that when the courts of circuit and appeal were abolished in 1845, the district courts succeeded immediately to their criminal jurisdiction. The evolution of the Bombay system was similar, but the criminal courts endeavoured to apply their personal law to Hindus, while Parsis were subjected to English law. In 1827 the law applicable in the Bombay *muffassal* courts was amended, simplified, and codified to an extent far exceeding that achieved in the other Presidencies.

The Road to Fusion; the First Indian Law Commission

The ultimate fusion of the two systems of courts and law might have been presaged from the appointment of Sir Elijah Impey, the first Chief Justice of the Calcutta Supreme Court, to perform the functions of the *Sadar Diwani Adalat* in 1780, but many years were to pass before the process was completed.

By 1833, in which year India was generally opened to European

[8] Governor-General, 1828–1835.

settlement, it had become clear that the dual system of courts, and the dual system of law, could not endure. Not only did the law of each Presidency Town differ from the law of the *muffassal* courts of that Presidency, but there were wide differences between the *muffassal* laws of the three Presidencies. The Provincial Regulations were not identical, and there were inevitable divergencies of opinion between tribunals administering a law, the greater part of which had received no more precise definition than "justice, equity, and good conscience," for it transpired that there was a remarkable dearth of indigenous legal principles upon which to base judgments in the cases coming before the *muffassal* courts.

In 1833, by the addition of the Law Member to the Governor-General's Council, and the abolition of the right to legislate by regulation in the Provinces, the opportunity for standardisation was given. The Law Member presided over a Law Commission, empowered to inquire into existing laws and courts, and the Act of 1833 said "it is expedient that such laws as may be applicable to all classes should be enacted." Macaulay, the first Law Member, laid down the policy "uniformity where you can have it, diversity where you must have it, but in all cases certainty."[3] However, the first All-India Legislature being constituted as it was, legislation inevitably lagged behind the need for it, and was undertaken piecemeal: priority was given by the Law Member to the needs of the commoner types of case in the *muffassal* courts, in which the law applicable was uncertain: the Council was not well disposed towards Bills raising delicate social, religious or political questions.

"A code," said Macaulay, "is . . . perhaps the only blessing which absolute governments are better fitted to confer on a nation than popular governments."[4] He regretted that "no part (of the law) can be brought to perfection while the other parts remain rude." A code, he said, should be so drafted as to be fully intelligible to the average, educated, intelligent person. His draft Penal Code, which had to wait long for enactment, set an example of what could be done to achieve this.

He also advocated the disposal of doubtful points in interpretation by the Legislature issuing successive editions of each code. Though this suggestion proved unacceptable, to it in part must be ascribed the fact that the Indian Legislatures can display to the world a fine record of legislative time spent in enacting and amending codes.

In 1840 the Law Commission published a report which, while maintaining the principle of applying to Hindus and Mahommedans

[3] Speech on Second Reading of Charter Bill, 1833.
[4] Speech on Second Reading of Charter Bill, 1833.

their personal law, recommended that the general law should be based on English law.

This decision was based on expediency rather than on a desire to impose British culture on India. English law prevailed in the Presidency Towns from which commerce radiated and, despite the saving of the personal law in matters of contract, it had been found in practice that there were few occasions on which the principles of English law were not applicable. The *Sharia* was not indigenous: on the criminal side it had already been supplanted. The Hindu law had mainly guided arbitration: to make either system the basis of the new law would offend the adherents of the community that followed the other. Among the indigenous commercial classes there had already been, to a considerable extent, a reception of English legal principles. The *muffassal* courts would be largely manned by Englishmen; they were more likely to do their work well if they applied English legal principles.

Later Law Commissions

A second Law Commission, which included two members of the first Commission and Sir John (later Lord) Romilly, sitting in London, decided in 1855 that, excluding Hindu and Mahommedan law, and subject to exceptions as to subjects and classes, a body of substantive civil law should be enacted for India as a whole. The third Commission, which again included Sir John Romilly and one member of the first Commission, commenced its labours in 1861, and their first draft became the Indian Succession Act of 1865. Drafts on Contract, Negotiable Instruments, Evidence, Transfer of Property, and Criminal Procedure followed, but now the Indian Legislature displayed a spirit of independence. Their objections, when reported to London, were rejected by the Commissioners, and the Secretary of State vainly ordered the Legislature to enact the drafts. The Commission resolved the deadlock by resigning, and thereafter the drafting of codes became generally the task of the Legislative Department of the Government of India, now the Ministry of Laws.

The Penal Code was enacted in 1860, Codes of Civil and Criminal Procedure in 1859 and 1861, the Evidence Act and the Contract Act in 1872, by which year so many codes had found their way to the Statute Book as to cause uneasiness among some British administrators. In 1875 a Fourth Commission, consisting of the Law Member, Dr. Whitley Stokes, and three Indian judges, recommended that Stokes' draft Bills on Trusts, Easements, Negotiable Instruments, and Transfer of Property, should be enacted forthwith; Tort, the

Law of Carriers, and the Law of Property should next be dealt with: the process of codification with the idea of *ultimate consolidation* into a general code should continue. Though diversity was enhanced by the restoration to the Provinces of their legislative powers in 1861, though the Indian Statute Book is a patchwork with some overlapping, and a few gaping holes, much has been done towards the goal set by the Fourth Commission, and one of the directive principles of State policy in the Constitution is "The State shall endeavour to secure for the citizens a uniform Civil Code throughout the territory of India."[a]

Since independence there has been set up a new Law Commission under the chairmanship of the Attorney-General, Mr. M. C. Setalvad, *including in its membership most of the senior law officers* in India. It has conducted a far-reaching examination into the legal system and the Statute Book and published a number of reports, approving basic principles but recommending amendment in detail. The Legislatures do not appear to have given the *recommendations* the attention they deserve.

Fusion Achieved

Before the amalgamation of the *muffassal* system of courts with the Presidency Towns system was possible, some assimilation of the two systems of law, and particularly the systems of procedure, was essential. Steps in this direction, slow at first, were accelerated when, in 1858, the Company's powers were abolished, and the Crown, whose creatures the Presidency courts were, assumed direct responsibility for the government of India. The Indian High Courts Act, 1861, an Act of the British Parliament, abolished the *Sadar Adalats*; their jurisdiction, together with the jurisdiction of the Supreme Courts, passed to the new High Courts established under the provisions of the Act. The jurisdiction and powers of the High Courts were defined by Letters Patent in such a way as to leave room for development by the Acts of the Indian Legislatures.

The assimilation of the systems of law progressed as the Legislature added new pages to the Statute Book, but there is still some diversity as between States, and also, to a *lesser extent*, between the law of the original side of the former Presidency High Courts, and the law of the *muffassal* courts. Except in so far as statutes have altered it, the original side of such a High Court administers the law formerly administered in the original *side of the preceding* Supreme Court. Anticipating by some years the policy of the Judicature Act in England, in the High Courts the distinct law and equity sides of

[a] Art. 44.

the Supreme Courts were amalgamated, but "Equity" in the Supreme Court meant something different from the rule of "justice, equity, and good conscience" in the *muffassal*. By 1887, however, the phrase which had so long been the residuary rule in the *muffassal* courts had usually come to mean for the future the rules of English law if applicable to Indian society and circumstances.[8]

Under powers granted by the Indian High Courts Act of 1861, a High Court was established in Allahabad in 1866, but, as this inherited the jurisdiction of the *Sadar Adalat* set up in the North-West Provinces in 1831, it is mainly a court of appeal, and the jurisdiction of its original sides, civil and criminal, is more limited than that of the Presidency High Courts, for most of the original work is done by district courts and courts of session. It can remove to itself civil suits in courts subordinate to it, and, on the criminal side, try persons brought before it by an authorised law officer. It also has original jurisdiction under certain Indian statutes such as the Indian Succession Act, and the Indian Divorce Act.

In the non-regulation Provinces, where the principle of separation of powers was not at first followed as it was in the Presidencies, judicial powers were vested in the Revenue Officers, but a judicial commissioner was appointed to perform many of the functions of a High Court. As time went on, however, the system in these Provinces was gradually assimilated to that prevailing in the Presidency Towns. In the Punjab, the judicial commissioner was replaced in 1866 by a Chief Court, which mainly differed from the High Court of Allahabad in that it was a creature of an Indian statute, and the judges were appointed by Government and not by the Crown. The Chief Court of the Punjab became the High Court of Lahore in 1919. The judicial commissioner in Oudh was only replaced by a Chief Court in 1925. The High Court at Patna was created in 1916, with the power of superintendence over the courts in Bihar and Orissa; as Orissa has a seaboard, the Patna High Court differed from the other High Courts outside the Presidency Towns in having Admiralty jurisdiction.

The Present System of Courts

The jurisdiction and powers of the pre-existing High Courts are continued by the Constitution. The jurisdiction and powers of the inferior courts are contained in Central and Provincial statutes.

On the criminal side, there is a great measure of uniformity throughout India, as the Code of Criminal Procedure applies to all courts. Apart from the High Courts, there are courts of session, and

[8] *Waghela v. Sheikh Masludin* (1887) L.R. 14 I.A. 89.

courts of magistrates of the first, second and third class. A judge of a court of session, who usually sits alone but sometimes sits with a jury, may pass any legal sentence, but a death sentence is subject to confirmation by the High Court. An assistant sessions judge may not pass a sentence of imprisonment exceeding seven years. The jurisdiction of each class of magistrates is limited to specified crimes; a magistrate of the first class may pass a sentence of imprisonment not exceeding two years, or of a fine not exceeding two thousand rupees; a magistrate of the second class is similarly limited to six months and five hundred rupees, and a magistrate of the third class to one month and a hundred rupees. The sessions judge is usually the district judge, and stipendiary magistrates may be judges of inferior civil courts or revenue officers.

The sessions judge and the district magistrate both superintend the courts of magistrates subordinate to them. Appeals from magistrates of the second and third class lie to the district magistrate, appeals from other magistrates lie to the court of session. Appeals from the court of session lie to the High Court. All sentences are appealable except sentences of imprisonment not exceeding one month passed by a court of session, or a sentence of fine not exceeding fifty rupees (or two hundred rupees if the case is tried summarily by a magistrate) passed by a court of session, district magistrate, or magistrate of the first class. Appeals against acquittals are permitted.

A party aggrieved by any order passed in a criminal case may also move the district magistrate, the court of session, or the High Court in revision; the court of session and the district magistrate have limited powers of interference, but they may recommend interference by the High Court.

Throughout India, the district court is the principal civil court outside the Presidency Towns, without pecuniary limits to its original jurisdiction; it has wide powers under special Acts such as the Succession Act, the Provincial Insolvency Act, the Guardian and Wards Act, and the Divorce Act. It is also a Court of Appeal, and has powers of superintendence over the other subordinate courts of the district.

The jurisdiction of civil courts subordinate to the district court is limited territorially, in relation to value of the proceedings and in relation to subject-matter. Under the Bombay Civil Courts Act, 1869, there are assistant judges who may try civil suits not exceeding Rs. 15,000 in value and receive various kinds of applications but not appeals. There are also two grades of civil judges, the senior having jurisdiction in civil suits irrespective of value, the junior being restricted to suits not exceeding Rs. 10,000 in value. Appeals over

Rs. 10,000 in value lie to the High Court. Under the Madras Civil Courts Act, 1873, there are subordinate judges, empowered to try civil suits irrespective of value and district *munsiffs* who may try suits valued at not more than Rs. 5,000. Appeals lie to the High Court if the value exceeds Rs. 5,000. In other States similar legislation contains provisions not differing in principle from these statutes.

No second appeal lies from a decree in a suit of a kind cognisable by a small cause court, if the value is Rs. 1,000 or less. From other decrees a second appeal lies on a point of law or because of a substantial defect in procedure likely to have resulted in error. Where no appeal lies, the High Court may interfere in revision if the court below has refused jurisdiction or acted without jurisdiction or acted illegally or with material irregularity.

City civil courts with limited pecuniary jurisdiction have been established in Madras and Bombay, and have absorbed some of the work formerly performed by the original sides of the High Courts in those towns. If this be regarded as an encroachment of the *muffassal* system upon the Presidency Towns, the creation of small cause courts in the *muffassal* may be looked upon as compensating for it. Small cause courts follow a summary procedure, and their judgments are not ordinarily appealable, though errors in law may be rectified in revision. Only suits of a type for which such procedure is suitable are cognisable by small cause courts.

CHAPTER 13

CRIMINAL LAW

The Indian Penal Code

Substantive Criminal Law is on the Concurrent List[1]; in case of conflict between a Central Act and an Act of a State Legislature, the Central Act prevails, except in the circumstances pointed out at p. 96.

The basic crimes are defined in the Indian Penal Code of 1860, mainly the work of Lord Macaulay and founded on English law, with modifications and adaptations to Indian conditions. Some acts which are only tortious in England are, in certain circumstances, crimes under the Penal Code. The Code is balanced and articulated: almost without exception the same word or phrase is used in the same sense throughout; offences and defences are lucidly defined, to the intent *that it should be completely intelligible to the average educated* person. Whenever possible the definitions of the more serious offences are built up by the addition of ingredients to minor offences already defined, and the effect is explained by illustrations in the nature of epitomes of leading cases; it has greatly influenced the form of all subsequent Indian codification. It has been adopted by other countries in Asia and Africa.

No distinction comparable to that between treasons, felonies and misdemeanours is drawn by the Code. A person can participate in any crime either as a principal or as an abettor: ineffective incitement to commit any crime is punishable as abetment. In so far as they are crimes, being an accessory after the fact and misprision are substantive offences defined by the Code. In a few cases preparation to commit a crime (*e.g.*, a dacoity and riot) is punishable. Conspiracy to commit a crime is an offence in itself; conspiracy to do any other illegal act requires the doing of an overt act.

A few crimes under the Code are punishable irrespective of the *offender's state of mind, e.g., a person for whose* benefit, or on whose land a riot takes place is criminally liable unless he does all in his power to prevent it. The remaining crimes can be divided into three categories. The first consists of acts done with a specified intent, such as criminal trespass; the second category consists of "voluntary" acts, *i.e.*, acts done either with the intent

[1] Sched. 7, List 3, item 1.

that specified consequences shall follow, or with the knowledge that the specified consequences are likely to follow, or under circumstances in which the average man would assume the specified consequences would follow; the third category consists of rash or negligent acts, rashness being interpreted as taking a risk though conscious of it, and negligence as failure to exercise the power attributable to the average man of recognising a risk. Often a series of enhanced maximum punishments are provided for crimes committed in aggravating circumstances or with ulterior motives.

The treatment of homicide is subjective; there are three degrees, dependent on the offender's state of mind. If there is an intention to cause death, or injury sufficient to cause death either to the average man, or owing to a peculiar physical disability of which the offender is aware, to the deceased, the crime is murder. If, without intention, the offender knows that the act done must almost inevitably cause death, and does it without excuse, the offence is murder. Murder is punishable either with death or imprisonment for life. If the intention is to cause injury likely to result in death, or if the offender acts with the knowledge that his act is likely to cause death, the offence is culpable homicide. The third degree of homicide is causing death by a rash or negligent act in circumstances which do not come within the definitions of murder or culpable homicide.

The Code recognises grave and sudden provocation as a partial defence to a charge of assault or an offence causing injury to the body; it justifies a verdict of culpable homicide on a trial for murder. The same consequence follows on proof of death being caused in a sudden fight on equal terms or by a public servant or person assisting him in the bona fide belief that he is doing his duty when, in fact, he is exceeding his legal powers. A person acting bona fide in the exercise of the right of private defence but exceeding the powers given by law enjoys a similar protection. It is also a partial defence that the deceased, being a major, consented to the doing of the fatal act.

In defining other crimes against the body, a clear and accurate distinction is drawn between hurt and grievous hurt. Voluntarily obstructing a person proceeding in a direction in which he has a right to go is the crime of wrongful restraint: if the restriction extends to all directions it is wrongful confinement. Taking a male under sixteen or a female under eighteen out of the keeping of any person in lawful custody of the minor without that person's consent is kidnapping from lawful guardianship, and taking a person outside India without his consent or the consent of his guardian is kidnapping from India. Abduction is inducing a person to move from one

place to another by force or fraud, but it is not a crime unless there is an ulterior motive, such as that the victim shall be murdered or wrongfully confined in secret, or, if the victim is a female, that she shall be seduced or married against her will. The pre-existing provisions for the protection of women and children have been strengthened by the addition of new sections to implement the International Convention of 1910 for suppressing traffic in women.

The Chapter dealing with offences against property is probably the best in the Code. All offences in the nature of larceny are offences against possession, which means control, except that possession of an individual's wife, clerk, or servant on that individual's behalf is deemed possession of that individual. "Dishonestly" is defined as intending illegal loss or gain, and "fraudulently" is interpreted to mean intent to deceive and thereby induce a course of action advantageous to the deceiver or injurious to the deceived person. Theft, extortion, and cheating involve a transfer of possession to the offender, though, in the case of theft, its commencement is sufficient. Theft is the moving, without consent, and with intent to take dishonestly from another's possession, any movable property. Extortion is dishonestly inducing delivery by threat of injury to any person. Cheating is fraudulently or dishonestly inducing delivery by deceit, and also by deceit inducing a person to do an act, injurious to himself, which he would not have done unless deceived. Criminal misappropriation and criminal breach of trust require no transfer of possession. The former covers any dishonest appropriation of movable property, though the finder who takes reasonable steps to find the owner is protected. Criminal breach of trust requires the offender to have received the relevant articles in a fiduciary capacity. These definitions are sufficiently comprehensive to cover all common cases of dishonest conduct. Without straining them, they cover many difficult cases in British law. The depositor who takes more than he is entitled to draw from an incautious Post Office Savings Bank clerk,[1] and the man who retains the sovereign lent by a friend in mistake for a shilling,[2] are guilty of criminal misappropriation. The offence of robbery is built up from the definitions of theft and extortion, by adding the element of the threat of hurt or wrongful restraint. Dacoity, a crime of administrative importance in India, is robbery committed by five or more, including those actually present and assisting.

Criminal trespass is entry on another's property with intent to commit an offence, or intimidate, insult or annoy anyone in possession. If the property is a building, tent, or vessel used as a dwelling,

[1] *R. v. Middleton* (1873) L.R. 2 C.C.R. 38. [2] *R. v. Ashwell* (1885) 16 Q.B.D. 190.

or for worship, or for keeping property, it becomes house-trespass. If the offender takes active steps to conceal the trespass, it becomes lurking house-trespass. If he effects his entry by certain specified means (mostly those constituting a "breaking" in English law), it is housebreaking. Destroying or deleteriously altering the condition or situation of property, with intent to cause or knowing it to be likely to cause wrongful loss or damage to the public or any person, is the offence of mischief.

Defamation, as defined in the Code, rejects the distinction between libel and slander. The offence is committed by publishing a communication with intent to harm, or knowing it to be likely to harm, the reputation of another. The truth of the communication is a defence if its publication was for the public good; bona fide criticism of the conduct of a public servant or other person in his public capacity, the publication of a substantially true report of proceedings in a court, bona fide criticism of the conduct of any person in relation to those proceedings, and bona fide criticism of books, speeches, and other performances submitted to the public, are all privileged. Bona fide censure by a person in authority, a charge made bona fide to a person in authority, an imputation made bona fide for the protection of an interest and a caution for the good of the person to whom it is made or for the public good are also privileged.

The offence of giving false evidence differs from the English crime of perjury in that the question whether the false statement was material to the cause does not affect liability in India, but frivolous prosecutions are prevented by the rule that a prosecution cannot be instituted except on the complaint of the court in which the statement was made. No particular number of witnesses or method of proof is necessary, and the false statement need not have been made on oath, nor in a judicial proceeding; it is sufficient that there was a legal obligation to speak the truth.

Forgery at Indian law departs from the English definition, which has been summarised as the making of a document which tells a lie about itself, in that it includes inducing an insane or intoxicated person, or a person who has been deceived, to make a document in ignorance of what he is doing or the nature of the document. A document is not the material on which a message is expressed, but the message itself.

Heavy penalties are prescribed for making, possessing and delivering counterfeit coin, currency notes and stamps. A public nuisance is any act which causes common injury, danger or annoyance to people living in the vicinity or exercising a public right; enhanced punishment is prescribed for some specified nuisances. Various acts

of negligence endangering the human body are punishable; so are adulteration of food and drugs and sale of adulterated and sub-standard food and drugs.

Bigamy was so defined as to leave the personal law untouched, but the recent amendment of the Hindu law leaves polygamy permissible only to Muslim citizens. The offence is committed by going through a form of marriage which is void because the spouse of an earlier marriage is living; it is a defence that such spouse has not been heard of for seven years and that the other party to the later marriage has been informed of the facts.

Causing a woman to cohabit by deceitfully inducing a belief in marriage, *fraudulent mock-marriage, and enticing* a married woman and rape are criminal offences. Adultery by a man with a married woman is an *offence* but a *prosecution* must be instituted by the injured husband. Incest is not an offence.

An unlawful assembly consists of at least five persons with the common object of committing an offence under the Code or any *other offence punishable with six months' imprisonment,* or with the common object of resisting any law or legal process, or overaweing a *public servant, or enforcing* a *property right,* or inducing any person to do what he is not legally bound to do, by threat of *personal violence.*

Misconduct by or in relation to public officials, contempts of the *authority of public officials, and offences against public* justice make long chapters in which the different offences are carefully defined. *The corrupt official is the principal offender;* he who tenders the bribe is the abettor.

The *offences against religion* are based *on* the principle that everyone shall be free to practise his own religion but no man shall insult another's religion. It is an *offence* to injure any place of worship or sacred object with intent to insult religion or to trespass on any place of worship, cemetery or crematorium or to disturb a funeral with intent to wound feelings or to disturb a religious assembly. Though religious controversy is permitted, communications deliberately intended to outrage religious feelings are punishable.

The defences of mistake, infancy and insanity show little deviation from English law, but the right of private defence is precisely defined and more extensive; it may be exercised against acts which are, or, but for the absence of the necessary mental element in the doer, would be offences against the person or property of any person. The right is coterminous with the danger, and never extends to doing more harm than necessary; it may not be exercised if there is time to have resort to the public authorities, nor against a public servant

unless there is danger of grievous hurt. Subject to these limitations, it extends to the causing of death when there is danger of grievous hurt, rape, kidnapping or secret wrongful confinement, and against robbery, housebreaking by night, or mischief by fire in a building. Where there is danger of any other offence against the person, or of theft, mischief, or criminal trespass, it extends to causing any harm short of death.

The defence of necessity can be pleaded to a charge of doing an act causing harm, if the act was done to prevent other harm so imminent and serious as to justify the risk of the harm actually caused; whether the apprehended danger justified taking the risk is a question of fact.

The rules as to acts done while involuntarily intoxicated are the same as at English law, but, if an act is done while voluntarily drunk, the doer is deemed to have acted with the same knowledge, but not the same intention, as he would have had if sober. An inebriate who, through careless horseplay on a station platform caused a friend to fall before a passing train would find himself charged, not with causing death by a rash act, but with culpable homicide.

Procedure in Trials

Criminal Procedure is on the Concurrent Legislature List.[4] In 1847 the first Indian Law Commission was required to prepare a draft Code of Criminal Procedure. The results of its labours were laid before the Third Indian Law Commission, which used it as the basis of a new draft which was enacted as the first Code of Criminal Procedure in 1861. After four amendments, it was superseded by the Code of 1872, but this Act, like those already mentioned, was only applicable to the *muffassal* courts. Procedure in the High Courts, originally identical with that in England, had been modified by Indian Acts, providing, for instance, for a majority verdict of a jury, and was ultimately consolidated in an Act of 1875. Procedure in the Presidency magistrates' courts was dealt with separately in an Act of 1877. The Code of Criminal Procedure of 1882 repealed all these Acts, and substituted one law of procedure for all Indian courts, but there followed sixteen amending Acts before the present Code was enacted in 1898, and this has since undergone considerable amendment.

Before 1923 Europeans enjoyed special privileges. Though amenable to the courts in the Presidency Towns, the Company's *muffassal* courts had no jurisdiction over them until an Act of 1836

[4] Sched. 7, List 3, item 2.

provided that European offenders in the *muffassal* should be tried by the Supreme Courts, except for minor offences, for which they would be tried by European justices of the peace. In 1872 the jurisdiction of the ordinary courts was extended to Europeans, though powers were limited and a special procedure was prescribed. In 1883 a proposal to give Indian judicial officers jurisdiction over Europeans aroused such an outcry that by way of compromise an Act of 1884 gave Europeans the right to trial in the court of session or before a district magistrate with a jury of which at least half were Europeans. This continued until 1923 when these special provisions were replaced by others which, when the complainant was a European and the accused an Indian or vice versa, the accused could claim a trial in the court of session with a jury of which at least half were of his own colour. These and all other provisions savouring of racial discrimination were repealed by the Criminal Law (Removal of Racial Discrimination) Act, 1949.

Cases coming before magistrates are either warrant or summons cases according as the maximum punishment for the offence alleged does or does not exceed one year's imprisonment. In a summons case, the substance of the allegation is explained to the accused, who may be sentenced forthwith if he admits liability. If he does not, the prosecution witnesses are examined, the accused is examined, and then his defence witnesses are heard. In a warrant case, since the enactment of the Code of Criminal Procedure (Amendment) Act, 1955, the procedure depends on whether the case was instituted on complaint or on a police report. In the latter case, the magistrate must ensure that the accused has been supplied with a copy of the police report, setting out the nature of the information, the names of the parties and the witnesses. Having studied this, he must hear the prosecution and defence; he may examine the accused. If he considers the charge groundless, he may discharge him; otherwise he will frame a charge, explain it to the accused and record his plea. If the accused pleads guilty, he may be sentenced forthwith. If he does not, the magistrate must fix a day for hearing the prosecution witnesses. After they have been heard the accused enters on his defence and the magistrate must summon the witnesses he requires, unless he thinks the request vexatious or dilatory. After hearing the defence, the magistrate must either find him guilty and pass sentence or not guilty and acquit him.

If the case has been instituted on complaint, the procedure applicable to all warrant cases before 1955 is followed. The magistrate must examine the witnesses produced for the prosecution and any other witnesses he thinks likely to be acquainted with the facts.

He may then examine the accused and, if he thinks no case has been made out, discharge him. If he thinks there is a case to answer, he must frame a charge and record the plea. Unless the accused pleads guilty, he must grant an adjournment to enable the accused to say which witnesses he wishes to recall for cross-examination. After they have been recalled and cross-examined, the accused enters on his defence and the trial proceeds in the same way as if it had been instituted on a police report.

A magistrate may be empowered to try summons cases and certain warrant cases summarily; the record of such a trial need only give essential particulars about the accused, the offence and the finding, with brief reasons in case of conviction and sentence. Otherwise, in a summons case and in a warrant case dealing with an offence triable summarily, the magistrate must make a memorandum of the evidence as the case proceeds. In other cases the evidence of each witness must be taken down in full, but in narrative form, either by himself or from his dictation in open court. It is read over to the witness, corrected if necessary and attested by the magistrate. Indian procedure, civil as well as criminal, assumes that any case of importance will be appealed and that the main function of the trial court is to prepare a full record for the use of the appellate court. In the event of a conviction or acquittal the magistrate must write a judgment, setting out the points for determination, the findings thereon and his reasons; in effect he must discuss all evidence of importance.

The more heinous offences are tried either in a court of session or a High Court on an order of committal made by a magistrate. If the magistrate takes cognizance on a police report, he must see that the accused has been furnished with a copy, issue summonses to such witnesses as the court prosecuting officer requires and adjourn the case for at least a fortnight. At the next hearing he must examine such eye-witnesses as the prosecution tenders and he may examine others before examining the accused. He must then, if he does not discharge him, frame a charge, give the accused a copy, and ask for his list of defence witnesses, but this will not prevent the accused citing witnesses later. The magistrate must then make an order of committal, giving his reasons, and bind over the witnesses. This procedure was introduced by the Amending Act of 1955. The old procedure still governs cases instituted on complaint. The magistrate hears all the witnesses produced by both sides and others if he chooses, examines the accused and either discharges him or frames a charge. The accused is then asked for his list of defence witnesses, whom the magistrate may, in his discretion, summon and examine.

If, after doing so, he thinks there are insufficient grounds for commitment, he may cancel the charge. Otherwise he will make a committal order and bind over the witnesses.

A trial before a High Court is by a jury of nine. A State Government may make an order for the trial of all or particular classes of offences to be tried by a jury of seven or nine and revoke or alter the order. In the absence of any such order applicable to a case before a court of session, the trial is before the judge alone; before 1955 a trial would be either by jury or with assessors, whose opinion on the case would not be binding on the judge. When the accused is brought before the court, the charge is read over and his plea recorded; he may be convicted if he pleads guilty; if he does not and the case is to be tried by jury, it is selected out of those chosen by lot from the annually revised jury list. The public prosecutor opens, and examines his witnesses. The examination of the accused in the committal proceedings is read and the accused is asked if he wishes to adduce evidence. If he does not, the public prosecutor sums up and, if he thinks there is no evidence to support the charge, the judge may record a finding of not guilty or, if there is a jury, direct them to return a verdict of not guilty. If the accused says he intends to adduce evidence or if the judge thinks there is a case to answer, he must call on the accused for his defence. The accused or his pleader then opens, examines his witnesses and sums up. If the trial is by jury, the judge must charge the jury, summarising the evidence on both sides and laying down the law applicable, before the jury retires to consider its verdict. Though a majority verdict may be accepted, the judge may require a jury which is not unanimous to consider the matter further. In a court of session, the judge may refer the case with his reasons for disagreeing with the verdict to the High Court, which may exercise all powers it might exercise in appeal. In a case tried by a sessions judge alone, the judge must write a judgment, containing all the particulars mentioned above. The rules for the recording of evidence in a warrant case also apply in the court of session but a High Court can make its own rules.

The Criminal Procedure Code (Amendment) Act, 1955, makes an accused a competent witness but provides that he shall not be examined on oath except at his request in writing; failure to give evidence shall not raise any presumption against him. If he does not choose to give evidence, the old law applies. He may be examined at any stage but, whatever the nature of the proceedings, he must be examined by the court after the prosecution witnesses and before he enters on his defence. This examination must not be inquisitorial: its object is to put before him the salient points in the prosecution

case, to enable him to offer an explanation or comment. The record *must be in the form of question and answer, if possible in the* language in which he is examined. It must be read over to and signed by the accused.

Proceedings may usually be instituted before a magistrate either by a direct complaint or in consequence of a report made to the police by any person, but certain offences and offences *committed* by certain persons cannot be inquired into except upon the complaint, or with the sanction, of a specified authority or person. Offences against the State need a complaint by government. Most *contempts of the authority of public servants require the complaint of* the public servant concerned; most offences against public justice require the complaint of the court in relation to which they were committed. A complaint of criminal conspiracy can only be made *by an official. A judge or a public* servant not removable without the sanction of the State Government or other higher authority can only be prosecuted for an offence alleged to have been committed while purporting to act in the discharge of his official duty with *the sanction of* the State Government. Complaints of defamation and of offences against marriage can only be instituted by the person aggrieved.

Investigation by the Police

For the purpose of police investigation the Code divides crimes into cognizable and non-cognizable offences: it specifies the offences under the Indian Penal Code which come in each class. Offences against other statutes, unless the statute prescribes otherwise, are *cognizable if they are punishable with three years' imprisonment or* more. The police are not normally concerned with non-cognizable offences. All offences which tend to cause public alarm or affect the preservation of public order are cognizable.

A *police officer may arrest* without a *warrant* not only a person reasonably suspected of being concerned in a cognizable crime, but also any person he knows to be intending to commit such an offence, if there is no other obvious method of preventing it.

Normally the investigation of a cognizable case commences with the recording of a first information report by the officer in charge of the police station having jurisdiction in the place where the offence was committed; the report is read over to and signed by the informant. *The police station officer either takes up the investigation* himself, or deputes the task to a duly-empowered subordinate, who is then clothed with his power and authority. He may summon any person who appears to know anything about the matter, but normally

he will seek out such persons, who are obliged to answer his questions, but not legally bound to tell the truth. The investigating officer may make records of the statements of persons he examines, and note the progress he makes in a special diary. If he thinks a search is necessary, he may, after recording his reasons in writing, conduct it without a warrant, but he is obliged to have present two respectable witnesses living in the neighbourhood, who must sign the record he makes of the things found and the places where they were found.

The Evidence Act, 1872, forbids the admission in evidence before a court not only of confessions made to the police, but also of confessions made while in the custody of the police unless they are made to a magistrate, and the Code of Criminal Procedure, 1898, imposes on magistrates a procedure which must be strictly followed if confessions recorded by them are to be admitted in evidence subsequently. A magistrate is obliged to inform the accused that he is not bound to confess, and that, if he does so, his confessions may be used against him; he is obliged to question the accused and satisfy himself that the accused wishes to make a confession voluntarily. As a matter of practice, he will allow the accused time to reflect on what he is about to do, free from contact with the police officers concerned with the investigation. If the accused still wishes to confess, the confession must be recorded in the form of question and answer, and if possible in the language in which it was made; the record must be read over to the accused, who must be given the opportunity to amend it before he signs it. The magistrate must certify in prescribed form that he has complied with the directions of law touching the matter.

Normally proceedings in the nature of inquests are conducted by the police, but the report must be submitted to a magistrate, who may decide to hold a judicial inquiry into the cause of death; a magistrate must invariably take this course if any person dies while in police custody.

Magistrates' Powers to Prevent Crime and Abate Nuisances

A person suspected of being likely to commit a breach of the peace may be required by a magistrate to show cause why he should not furnish security. Persons suspected of disseminating seditious matter, or who have no ostensible means of support, or who are reputed habitually to commit certain crimes, may be called on to furnish security for good behaviour. The magistrate holds an inquiry, following generally the procedure appropriate to a trial, and then either discharges the respondent or prescribes the security to be

furnished. If the respondent fails to comply with the order, he may be detained in prison. If he has furnished security to keep the peace, his security bond may be forfeited on conviction for any offence involving a breach of the peace; if he has furnished security to be of good behaviour, the bond may be forfeited on conviction of any offence punishable with imprisonment.

Any magistrate or police station officer may require any assembly of five or more likely to cause a disturbance of the peace to disperse, and failure to obey is punishable under the Indian Penal Code. A magistrate or police station officer may call on any male civilian to help in dispersing such an assembly. A magistrate may require any commissioned or non-commissioned officer of the armed forces to disperse such an assembly by military force, and such officer must comply with the request, but his method of doing so is within his discretion, except that he must use as little force, and do as little harm or damage as possible. A military officer may also, without a requisition from a magistrate, disperse such an assembly. No prosecution for any act purporting to be done in exercise of these powers can be instituted without the sanction of the State Government. The Code indemnifies police officers, magistrates, and military officers exercising these powers in good faith, as well as soldiers carrying out orders they were bound to obey.

The Code gives prescribed classes of magistrates wide powers to deal with nuisances, apprehended breaches of the peace, and apprehended danger to personal safety and property.

Any person who obstructs a public right of way, who carries on an offensive trade, who is in possession of a dangerous structure or substance, who has an unfenced well or excavation, or who has a dangerous animal, may be directed to comply with a suitable order. Such person, instead of complying with the order, may either demand a magisterial inquiry, or ask for the appointment of a jury. If the magistrate after inquiry still holds, or if the jury finds, that an order is necessary, the magistrate fixes a time for compliance, and failure to comply with the time specified is punishable under the Indian Penal Code. In an urgent case, the magistrate may pass a temporary order to cover the period during which the inquiry lasts.

If there is imminent danger of a breach of the peace, *e.g.*, on account of a proposed political speech or a procession, or of annoyance or injury to persons carrying on their lawful avocations, a magistrate may pass an order prohibiting the doing of any act which creates or enhances the danger, *e.g.*, he may forbid the speech or ban the procession, but the order must be negative in substance as well as grammatically, *e.g.*, he could not forbid the intending speaker to

live in his own town, for that is, in substance, an order directing him to leave the town; he could forbid him to make the speech. Such an order may, if necessary, be passed *ex parte*; it may be addressed to a particular person or to the public while visiting a particular place, such as a market. The persons affected must be given an early opportunity of showing cause against the order, and it will not be valid for more than two months unless it is notified by the State Government.

If a dispute over title to immovable property is likely to result in a breach of the peace, a magistrate may order the disputants to file statements of their claims to possession irrespective of title. An inquiry follows, and the magistrate passes an order confirming the right of the person in actual possession, or, if the other party has been wrongfully or forcibly dispossessed within two months before his original order, putting that party in possession, and forbidding interference except by process of a competent civil court.

If a dispute over an alleged easement or customary right is likely to involve a breach of the peace, a magistrate may require the disputants to file statements of their claims. After inquiry he may prohibit the exercise of the right alleged or forbid interference with it. The dissatisfied party may, of course, take the matter to a civil court, but the effect of these two last-mentioned provisions of the Code of Criminal Procedure is that parties sometimes deliberately bring disputes over title to land and easements before a criminal court, notwithstanding that they are matters more fitted for determination by a civil court.

Chapter 14

CIVIL PROCEDURE

Codes of Civil Procedure

The discrepancies in criminal procedure in different parts of India before the enactment of the Code of 1882 were less marked than those observed in the civil courts. When the Supreme Courts were established, they had different rules of procedure on their law, equity, ecclesiastical, and admiralty sides. In the *muffassal* courts, little discipline was exercised over pleadings, and regulations requiring issues to be framed before trial either did not exist or were often ignored. There were no clearly defined rules of procedure to be followed during the hearing of a case in the *muffassal*. In such circumstances, a direction in the Charter Act of 1833 to the First Indian Law Commissioners to inquire into the forms of procedure and suggest amendments should cause no surprise; by 1854 their draft was ready. After it had been studied by the Third Indian Law Commission, that body produced four draft codes, one each for the *muffassal* courts of Bengal, Madras, Bombay, and the North-West Provinces (now U.P.); these were amalgamated in India, and became the Code of 1859, introducing in the *muffassal* the practice of issuing temporary injunctions and appointing receivers for the protection of property in dispute. Four amending Acts and the extension of the Act to the High Courts preceded further amendment and consolidation in the Code of 1877, which introduced new rules governing joinder of parties, *lis pendens*,[1] foreign judgments, interrogatories, affidavits, documents, suits by or against persons under disability, interpleader suits, and execution, some adapted from the English Rules and the New York Code.

After amendment in 1879, the Code of 1877 was superseded by the Code of 1882, which introduced for the first time the exemption from attachment of the salaries of lower-paid public servants. Though the Code purported to be comprehensive, it empowered High Courts to make subsidiary rules consistent with it governing their own procedure.

The form of the Civil Procedure Code of 1908 derives from the (British) Judicature Acts, and the Rules framed under them, for the

[1] The principle forbidding the trial of a case when the same question awaits determination in a previously instituted case between the same parties or between parties under whom any of the parties to the later suit claim.

Code of 1877 had proved insufficiently elastic. The Code of 1908 is divided into two parts. The first consists of but one hundred and fifty-three sections, as compared with six hundred and fifty-two in the Code of 1877, in which the essential principles of the law of procedure are set out; these can only be amended by the Legislatures. The second part, which deals with the machinery to carry out the principles, consists of rules collected into orders, each of which deals with one subject; these rules can be added to, repealed, or amended by each High Court in their effect upon its own procedure, and the procedure of the courts subordinate to it. The High Court acts on the recommendations of the Rule Committee, selected from the Bench and Bar, and all alterations are subject to the approval of the Governor.

The Code gives jurisdiction over suits involving a right to property or office, notwithstanding that it may involve a decision on a religious question. After dealing with *lis pendens* and *res judicata*,[3] it proceeds, in general conformity with the law of England, to deal with the question when a foreign judgment is a bar to a suit on the same cause of action in India.

Assuming that a suit is not barred by any of these rules, the next question is where it may be instituted, and the first principle is that it must be instituted in the court of the lowest grade competent to try it. A suit relating to immovable property must be instituted in a court within whose territorial jurisdiction the property is situate, but if the remedy sought is specific performance or an injunction, or other remedy which can be enforced by the personal obedience of the defendant, a suit based on a wrong done to immovables may be instituted in a court within whose jurisdiction the defendant lives or works. In the case of most other suits, the plaintiff may choose between the court within whose territorial jurisdiction either the cause of action arose or the defendant lives or works.

A suit is instituted by the presentation to the court of a plaint, which is a document, signed and verified, setting out the principal facts relied on, and the relief claimed. If the plaint is accepted by the court, a summons to appear and answer is issued to the defendant. The document filed by the defendant in answer to the plaint is called the written statement, and no subsequent written pleadings except a defence to a set-off are allowed except with the leave of the court. In practice, the courts subordinate to the High Courts are not usually

[3] The bases of this plea are that nobody ought to be twice sued on the same cause, and that unnecessary litigation should not be permitted. The Code forbids the trial of an issue which has previously been directly in issue and decided by a competent court, in a suit between the same parties, or between parties under whom they claim, litigating under the same title.

disposed to enforce strictly the rules dealing with production of documents and other preliminaries to the actual hearing, except settlement of issues, *i.e.*, the framing of questions dealing with those propositions of law and fact which have been affirmed by one side and denied by the other. This done, a date for hearing is fixed, and processes to compel the appearance of witnesses and production of documents are issued.

The rules demand that at the hearing the plaintiff must begin, unless the defendant admits the facts alleged by him, and either relies on other facts or contends that the law does not allow the relief claimed on the plaintiff's facts. The party to begin states his case, and then examines his witnesses, whose whole evidence in an appealable case must usually be recorded in writing and signed by the judge. The other party then states his case, examines his witnesses, and addresses the court on the whole case; the party who began then replies.

The judgment must be in writing, and must contain a statement of the case, the points for determination, and the decisions thereon with reasons. After it has been delivered, a decree is drawn up and it is signed by the judge; it must contain the names of the parties, the particulars of the claim, the relief granted, or, if none, the substance of the order determining the suit, together with specific orders, with figures, for payment of costs.

A decree may be transferred to another court in India for execution, and pending such transfer, which requires a certificate as to the extent to which the decree has been satisfied, the original court may issue a precept to the other court to attach property within its jurisdiction. The court to which the decree is transferred has all the powers of the court which passed the decree, and determines all questions relating to its execution.

The Code itself sets out a list of property not subject to attachment; it includes essential clothing and household furniture, artisans' tools, agriculturists' houses and implements, together with a proportion of cattle and seed grain which may be varied by Government order (and naturally tends to increase), a labourer's wages, all or part of the salary or pension of a Government servant, and compulsory deposits in provident funds.

The rules require an application for execution to be in writing and in prescribed form. Most movables are attached by seizure effected by a process-server under the authority of a warrant; immovables by an order served on the judgment-debtor forbidding him to deal with them. If the property is not susceptible of actual seizure from the possession of the judgment-debtor—if, for instance,

it is a debt payable to the judgment-debtor—a prohibitory order is served on the person in possession or control.

Attachment may be followed by an application for its removal by a third party; the rules require a summary inquiry and order, which may be followed by a suit to establish the right denied in the summary proceedings.

Before attached property is sold, notice must be given to the parties and a proclamation containing particulars prescribed by the rules and settled by the court published. The proclamation must be posted on the court house, proclaimed by beat of drum near the property, and the court may require publication in a newspaper. The proclamation gives the date of sale, which must be at least fifteen days in the case of movables, and thirty in the case of immovables after the proclamation has been published. The sale is usually an auction conducted by the bailiff, an officer of the court in charge of property under the control of the court, and of the process-serving staff. The bailiff has a discretion to refuse the highest bid or postpone the sale. In the case of movables, the property passes at the fall of the hammer, but the rules governing sale of immovables are more elaborate. The judgment-debtor may secure postponement of the sale if he can satisfy the court that he may be able to raise the money to satisfy the decree by sale, lease, or mortgage of the attached property, or otherwise. If the property is knocked down, the successful bidder is only required to deposit one-fourth of the sale price, and has fifteen days in which to pay the balance. The judgment-debtor may still save his property if within thirty days he satisfies the decree and pays the successful bidder one-twentieth of the sum bid. Any person interested may move to set aside the sale for material irregularity or fraud in publishing or conducting the sale, and the successful bidder may apply to set aside the sale because the judgment-debtor had no saleable interest in the property, but failing a successful application of the kind indicated, the sale is confirmed by the court, which may order the purchaser to be put in possession. Resistance by the judgment-debtor or another person acting on his behalf may be punished by civil imprisonment, but a person unconnected with the judgment-debtor in possession on his own account who has been evicted may apply to be reinstated.

Suits against the Union or a State or a public officer must be preceded by two months' notice given to officials specified in the Code. A suit to abate a public nuisance and a suit arising out of a breach of a public charitable or religious trust require two plaintiffs and the *fiat* of the Advocate-General.

The right of appeal is not severely limited. The rules require an

appeal to be preferred in a memorandum setting out the grounds, accompanied by a copy of the decree and usually a copy of the judgment of the lower court. Unless, after hearing, the appellate court is satisfied that there are merits, the appeal will be dismissed without notice to the other party, but, if the appeal is admitted, the trial record is sent for, and notice is given to the respondent, who may, if so disposed, file a cross-objection to the decree. The Code itself lays down that when an appeal is heard by a bench of two judges, who disagree on a question of fact, the finding of the trial court stands, but a difference on a point of law must be referred for decision to a third judge.

The Code allows a review of a judgment by the court which delivered it, and the rules require an application for review based on a mistake apparent on the face of the record to be made only to the judge who delivered the judgment; there is no such restriction if the application is based on the discovery of new evidence. The Code gives a High Court discretion to deal in revision with any unappealable order of a subordinate court which has acted without jurisdiction or failed to exercise jurisdiction, or exercised jurisdiction illegally or with material irregularity.

The Indian Evidence Act

Since the time when Recorders' Courts were established in them, the English rules of evidence were followed in the Presidency Towns, but in the early days of the *muffassal* courts, the situation was variable and uncertain. Though a few rules were laid down in Regulations, beyond them the rule of justice, equity, and good conscience applied, with the result that sometimes the Muslim law of evidence was followed, but with the passage of time more frequently the English rules, or possibly "an imperfect understanding of imperfect collections of not very recent editions of English text-books."[3] From 1837 to 1853, Indian Acts introduced piecemeal new rules such as the rule that a party to a suit and a convict are competent witnesses, the rule that Hindus and Muslims may affirm instead of taking the oath, the rule that communications to a legal adviser are privileged, and the rule that a witness can be compelled to produce documents other than title-deeds. An Act of 1855 covered a wider field, but still only supplemented and amended the uncertain mixture of Muslim and English rules prevailing in the *muffassal*.

In the draft on evidence produced by the Third Indian Law Commission in 1868 there was no marked anxiety to impose on India

[3] Stephen, *Report of Select Committee on the Evidence Bill* (1876).

the English rules, which the commissioners regarded as peculiar to England, and *open to criticism for excluding* much useful material and for permitting publication of facts at least as dangerous as those excluded. They believed it more important in India to ensure that the court was sufficiently informed than *to* exclude *material* which might prejudice the court; they proposed to admit anything bearing on the issue unless specifically excluded, and they relaxed the English rules of exclusion, particularly with regard to hearsay. The commissioners' draft, however, found no favour in India, and experience suggests that in India more than in England it is important to have rules which exclude matter only remotely bearing on the points for determination, ensure judgment of the cause and not the litigant, and curtail the duration and expense of trials.

Fitzjames Stephen, who was Law Member at this time, had made a special study of evidence; he prepared a new draft, revised it in the light of criticism following its publication, and it was enacted as the Evidence Act of 1872. The Act has been criticised, but unfairly, as an arbitrary selection of sentences from *Taylor on Evidence*. The earlier sections of the Act, *after defining terms*, were original in that they endeavoured to state affirmatively what was evidence, which at least at the time of its enactment, was as necessary in India as *rules of exclusion*. *A fact is a thing, state of things, or* relation of things perceivable by the senses, or a mental condition such as good faith or intention to deceive. A fact in issue is a fact asserted by *one* party and *denied by the other*, from which *alone or* with other facts the existence, non-existence, nature and extent of the right claimed or liability urged necessarily follows. Evidence may be given of *facts* in *issue*, and of *facts* relevant to them. The *rules* which follow are based on the disputed theory that relevancy means connection as cause or effect, and Stephen later summarised them by saying that a fact is relevant to another if they are so related that according to the common course of events, one, either alone or with other facts, renders certain or probable the existence of the other. Though criticism of the philosophic basis of these rules may be valid, as practical rules they have served a useful purpose. They were evolved by placing in categories the facts set out in a number of reported English cases.

Having disposed of relevancy, the rest of the first part of the Act treats of admissions and confessions, statements of persons who cannot be called as witnesses, statements in accounts and publications, opinions of experts, and evidence of character. The second part deals with proof, and in particular with the proof of documents and the exclusion of oral by documentary evidence. The last part

deals with burden of proof, and estoppel[4] and lays down rules for the examination of witnesses.

Though the Evidence Act is based on English rules of evidence, there are some departures, and some of these are due to differing conditions in the two countries. In India, as there are no juries in civil cases, nor in the majority of criminal cases, some of the English rules based on the distribution of function between judge and jury are unnecessary. The tempo of an Indian trial, due to the necessity of recording the evidence in most cases in long-hand, is slower. Perjury and forgery are commoner, and less trust is placed in the police.

The Evidence Act permits the judge at any time to ask any question and insist on the production of any document, irrespective of the relevancy of the answer or the admissibility of the document, though it requires the judgment to be based on relevant facts properly proved. The word "admission" is used in the Act, not only to describe a point conceded in a civil suit, but also a statement made by a person accused of a crime in relation to the transaction which is not a confession; the accused person's lies, evasions, and excuses are "admissions" under the Evidence Act. Not only is a confession to a police officer inadmissible, but also a confession made while in police custody unless made to a magistrate. A declaration made by a dead person as to the circumstances resulting in his death is admissible in any case, civil or criminal, in which the circumstances of his death are in question, irrespective of whether he was in danger of death at the time of making it, or whether he was aware of the danger. In other cases in which the Act makes hearsay admissible, there is a relaxation of the conditions imposed by the English rules on admissibility. A child is a competent witness if he can understand the questions put to him. Facts set out in government maps or maps offered for public sale may be proved by production of the maps. Foreign law need not necessarily be proved by an expert, for the court may accept a statement in a book published under the authority of the foreign government; at least at the time when the Act was passed, it would have been impossible in the average *muffassal* court to have got better evidence.

It is difficult to explain why the right of a witness who is not a party to a suit to withhold his title-deeds should be broader than in England, or recognised at all. The Indian witness is denied the privilege accorded him in England to decline to answer a question which would tend to incriminate him or expose him to a penalty.

[4] When one person has intentionally caused another to believe a thing to be true and act upon it, he is estopped, in civil proceedings between them, from denying the truth of the thing.

but he is given the cold comfort that his answer shall not subject him to arrest, nor be proved against him in criminal proceedings. An Indian witness may be corroborated by his own previous statements, if made contemporaneously with the facts to which they relate, or if made before a competent authority. Apart from putting questions intended to establish the bad character or partiality of a witness, a cross-examiner in India usually seeks to discredit a witness by establishing discrepancies between a witness's evidence and his previous statements, or, failing that, to endeavour to get the witness into the box on more than one occasion, in the hope that his bad memory will produce discrepancies between the evidence given on different occasions. The quicker tempo of an English trial, on the other hand, makes more efficacious the technique of confounding the perjured witness by a serious of questions whose climax cannot be foreseen by the witness laboriously inventing an answer to the immediate question.

The Act rejects the terms employed by English lawyers to categorise presumptions, and endeavours to simplify the rules relating to them. Excluding a section held *ultra vires* of the Indian Legislature, the only instances of the *praesumptio juris et de jure* deal with judgments *in rem* and legitimacy; a judgment of a probate, matrimonial, admiralty or insolvency court affecting status or title to property is conclusive proof of what it declares, and the birth of a child during the continuance of a marriage or within two hundred and eighty days of its dissolution is conclusive proof of legitimacy unless non-access is established. Corresponding to the category of *praesumptio juris sed non de jure* are provisions mainly relating to documents; the Act says that the court shall presume specified classes of documents in certain circumstances to be genuine, but permits evidence to be led to rebut the presumption. In dealing with the *praesumptio judicis vel facti*, the Act says the court in its discretion may either require proof, or presume until rebutted, the existence of a fact likely to have happened in the light of human experience in the particular circumstances under inquiry, and gives a number of illustrations of this principle, such as the rule that the person in possession of stolen goods shortly after the theft may be presumed to be the thief or the receiver, unless he accounts for his possession. There are no illustrations to this section dealing with questions peculiar to India, and it is case law which says that a Hindu family is presumed joint, but if one member separates there is no presumption that the others remain joint, or separate, or reunite.

The provisions of the Act dealing with burden of proof are beginning to create difficulty. Some Indian courts have endeavoured

to follow the rule recently emphasised in England that the burden of proof in a criminal case never shifts from the prosecution, notwithstanding that the Act specifically states that the burden of proof of circumstances bringing the case within any exception in the Penal Code or other Act, that is to say, the burden of establishing any total or partial statutory defence, such as insanity or grave and sudden provocation, lies on the accused. Though the Act does not say so, the courts have always held that, whereas the prosecution is obliged to prove its case beyond a reasonable doubt, when the burden lies on the defence, it has merely to establish a prima facie case. Another provision of the Act requires a fact especially within the knowledge of a person to prove it; the Judicial Committee dealing with a case from Ceylon[5] held that this did not mean that a person charged with performing an illegal operation was bound to prove what he had actually done, but the Act illustrates this provision by obliging a person charged with ticketless travel to prove that he had a ticket. The Supreme Court has held that this provision cannot be used to undermine the well-established rule that save in a very exceptional class of cases, the burden is on the prosecution and never shifts.[6]

A provision in the original Act excluding all rules of evidence not contained in it or other statutes has recently been repealed, but the restriction of evidence to facts in issue and facts declared by the Act to be relevant remains in force. Though the rules dealing with relevancy are wide, there are instances of the exclusion of facts logically relevant and apparently unobjectionable, except on the ground that they do not come within any of the rules. New kinds of cases demand either new rules of evidence or a re-statement of old rules. The Act which, compared with other basic Acts, has received little attention from the Legislature, is beginning to show signs of age; re-statement of some parts and the addition of new parts seems desirable.

Limitation

Whereas the *Sharia* is silent on the subject of limitation of actions, there are texts dealing with the matter in the *Sastras*. After the establishment of the *muffassal* courts in Bengal, Regulations of 1793 and 1805 laid down a limit of twelve years for suits between private persons, and sixty for suits by government. By analogy, the twelve-year rule was applied to applications for execution. The Bombay Regulation of 1827 fixed one year for suits for compensation for

[5] *Attygalle* v. *King*, A.I.R. 1936 P.C. 169.
[6] *Shambhu Nath* v. *Ajmer*, A.I.R. 1956 S.C. 404.

injury to person or reputation, six years for suits for debt not supported by writing, and other suits for compensation, thirty years for recovery of immovables, and twelve years for other suits. Madras generally adopted the twelve-year rule. The English Statutes of Limitation were enforced in the Presidency Towns, after initial diffidence in the case of Indian litigants.

Though uniformity was obviously desirable, the draft of the first Limitation Act prepared by the First Indian Law Commission did not reach the Statute Book until 1859. This Act fixed uniform periods of limitation, and provided exceptions when the plaintiff was under disability, or absent from India, or if the suit was founded on a trust, and in other cases. It raised difficulties in determining the starting point of the period of limitation; something more precise than "when the cause of action arises" was needed.

The Act of 1871 was in a new form, which has since been preserved. The rules for the dismissal of suits as time-barred, and the effect of legal disability, were in the body of the Act, which for the first time included rules for the acquisition of titles by prescription. The periods of limitation were set out in schedules showing the starting point for various types of proceedings. The Act of 1877 superseded the Act of 1871, and was itself succeeded by the Act of 1908. This has been repealed by the Act of 1963.

The general principles of the Act of 1963 are almost the same as in the Act of 1908; some difficulties have been disposed of and some omissions rectified; the rules prescribing periods of limitation have been simplified. A court must dismiss a time-barred case even if limitation has not been pleaded. There is no period of limitation for proceedings against trustees or managers of religious or charitable endowments to recover the trust property. Where a right of action accrues to a minor or insane person, time begins to run when the disability ceases; if the disability continues till his death, the period of limitation for proceedings by his legal representative commences at his death. But the period of limitation arising from disability is subject to a maximum of three years from the cessation of the disability or the death of the disabled person. Once time has begun to run, no subsequent disability will stop it. Time spent on an application to sue as a pauper or in bona fide proceedings before an incompetent court and the period during which execution proceedings are stayed are excluded. Where a right of action or a liability accrues after a person's death or on his death, time does not begin to run until there is a competent legal representative. In a suit based on fraud or when knowledge of a right of suit has been concealed by fraud or in suits for relief from the consequences

of mistake, time starts to run when the fraud is discovered or the mistake is or could, with reasonable diligence, have been discovered.

A signed acknowledgment of liability in writing or payment of interest or part payment of principal starts a new period of limitation. An acknowledgment by one joint contractor does not bind the others. An acknowledgment by the manager of a Hindu joint family binds the family.

For most suits the period of limitation is three years. For actions for false imprisonment, malicious prosecution, defamation, seduction, inducing breach of contract, wrongful seizure of property by civil process and for pre-emption it is one year. For suits for compensation under the Fatal Accidents Act, 1855, and the Legal Representatives' Suits Act, 1855, it is two years. For suits relating to immovables, it is generally twelve years. The period of limitation for a criminal appeal to the High Court is sixty days, except in the case of a death sentence and an appeal against an acquittal by a private person, when it is thirty days; for an appeal by government against an acquittal it is ninety days. For a criminal appeal to a subordinate court the period is thirty days. For a civil appeal to a High Court the period is ninety days, to any other court thirty days. The period for an application to file or set aside an award of arbitrators is thirty days. For special leave to appeal to the Supreme Court it is ninety days, except when the appeal is against a death sentence or leave to appeal has been refused in the High Court when it is sixty days. The period for an application to execute a decree is twelve years. Twenty years' enjoyment of an easement creates a prescriptive right, except against Government, when the period is thirty years.

The Oaths Act

Some Indians are critical of the provision in the Oaths Act of 1873, which permits a Hindu or Muslim witness to affirm instead of taking an oath, and there seems a conflict in principle between this provision and another provision of the Act whereby a party may offer to admit if his opponent or another will take an oath of a kind usual among persons of his class not purporting to affect third persons. If the challenge is accepted, the court is obliged to arrange for the administration of the oath, and the statement so sworn to is binding on the challenger.

A child under twelve who does not understand the nature of an oath but understands the duty to speak the truth may be examined without oath or affirmation, but the omission to swear or affirm a witness, and irregularities in administering the oath or affirmation do

not affect the admissibility of the evidence nor the obligation to speak the truth.

Court Fees

Every plaint and memorandum of appeal must be engrossed on special paper bearing impressed stamps to the value of the appropriate court fee. The Court Fees Act, 1870, and the Suits Valuation Act of 1887 laid down rules for calculation of court fees, and the fees payable, usually by attaching adhesive stamps, on filing other applications in courts and public offices, including fees for the issue of processes. A subsequent amendment dealt with fees payable on probates and letters of administration. As fees taken in courts are matters on the State List, States have exercised their powers to amend the original Act, so that court fees differ in different States.

The Civil Procedure Code permits a suit to be instituted without payment of the prescribed court fee if the plaintiff has not got sufficient means to pay the necessary court fee, or, when no fee is payable, property worth one hundred rupees, but he must show that *the suit is within time and prima facie maintainable*, and satisfy the court that he has not given another person an interest in the proceeds of the suit, nor, within the preceding two months, disposed of property to enable him to plead pauperism.

Insolvency

Insolvency jurisdiction commenced with a British Act of 1800, empowering the Supreme Courts to make rules for the discharge of the debts of insolvents by instalments. A British Act of 1828, reflecting the change in British practice, established in the *Presidency* Towns courts for the relief of insolvent debtors; the business of these courts was conducted by persons appointed by the Supreme Courts: a judge of the Supreme Court would sit in the court once a month and could discharge an imprisoned debtor on such terms as he thought fit. These principles were elaborated in the Indian Insolvency Act, 1848. Letters Patent issued to the High Courts set up under the Indian High Courts Act, 1861, required each of them to establish a court for the relief of insolvent debtors to be presided over by a judge of the High Court. In 1909 the Indian Central Legislature enacted the Presidency Towns Insolvency Act, which is still in force in those towns.

In the *muffassal* the Code of Civil Procedure, 1859, provided that an arrested judgment-debtor could apply to any court not established by royal charter for his discharge on placing his property at the disposal of the court and satisfying it that he could not pay the debt. The Code of 1877 empowered a judgment-debtor to apply to the

district court to be declared insolvent and be discharged from arrest or imprisonment. The Code of 1882 enabled a creditor to apply for the adjudication of his creditor. It also provided for the appointment of a receiver of the insolvent's assets, rateable distribution among his creditors, discharge of the insolvent after twelve years or earlier, if his creditors had received satisfaction to the extent of one-third. The court could order the imprisonment of the debtor for fraud or bad faith. The Debtor's Act, 1888, empowered a court to discharge a judgment-debtor brought before it if satisfied that he was unable to pay. The *muffassal* insolvency law was codified in the Insolvency Act, 1907, subsequently replaced by the Act of 1920.

The Presidency Town Insolvency Act, 1909, is based on the (British) Bankruptcy Acts of 1853 and 1890. It lays down the procedure to be followed in the High Courts of Bombay, Calcutta and Madras and provides for its further elaboration by rules made by the High Courts.

The Provincial Insolvency Act of 1920, which governs procedure in *muffassal* courts, while based on the same principles, provides a simpler (some have said over-simple) procedure. Both Acts provide for adjudication on a debtor's or a creditor's petition, and the setting aside of antecedent gratuitous transfers of property, and transfers with intent to defeat creditors or in preference of one creditor. Under the Presidency Towns Act, the Official Assignee, appointed by the Chief Justice, is charged with the duty of investigating the insolvent's conduct as well as getting in and distributing the insolvent's property. The corresponding provisions of the Provincial Act require the appointment of a receiver, who may be the bailiff of the court, or a member of the Bar, appointed *ad hoc*, though an Official Receiver may be appointed. The provisions governing the discharge of the insolvent, even in the Provincial Act, are more elaborate than those contained in the Code of Civil Procedure of 1882, and give the insolvency court no jurisdiction to commit the insolvent to prison. The Act defines offences punishable under the Acts, which must be tried in a criminal court. Whereas in the Presidency Towns, satisfaction of debts to the extent of one-fourth is prima facie a ground for discharge, the corresponding fraction in the Provincial Act is one-half.

Arbitration

The Code of Civil Procedure of 1908 contained in a schedule provisions governing a reference to arbitration agreed on after the institution of a suit, stay of a suit where there was a pre-existing agreement to refer the subject-matter to arbitration, the enforcement

of an agreement to refer a matter in dispute to arbitration, and the enforcement of an award made by an arbitrator without the previous intervention of a court. The Arbitration Act of 1899 only applied when the matter referred to arbitration, if the subject of a suit, could have been determined by a court in a Presidency Town, though its provisions could be extended to other towns. This Act only dealt with references to arbitration in pursuance of existing agreements to refer. It set out conditions implied in such agreements unless excluded, and empowered a court to appoint an arbitrator in case of deadlock. The court could remove an arbitrator for misconduct, and set aside an award if an arbitrator misconducted himself, or if the award was improperly procured.

The Act of 1899 and the provisions relating to arbitration in the Code of 1908 were repealed by the Arbitration Act of 1940, which consolidates the Indian Law of Arbitration. In dealing with arbitration under an agreement, it provides for the removal of an arbitrator by a court, not only for misconduct, but also for being dilatory, and enables the court to appoint a substitute. The powers of an arbitrator are more precisely defined, and the court has power to set aside or modify an award or return it for reconsideration. The court having jurisdiction under the Act is the court in which a suit on the matter in dispute could be instituted, but a Small Cause Court only has power to refer to arbitration a matter in dispute in a suit before it. Most of the orders passed by a court under the provisions of the Act are subject to appeal.

India having signed the 1923 Geneva Protocol on Arbitration, and the Convention on Foreign Arbitral Awards, the Arbitration (Protocol and Convention) Act, 1937, was enacted to implement them. It applies only to awards in commercial matters, regarded as such at Indian law, and between nationals of countries which have made reciprocal provisions to give effect to the Protocol and Convention in accordance with their terms. These require the procedure to follow the law of the country in which the arbitration takes place. The Act provides for the stay of a suit in an Indian court when there is a subsisting and operable agreement to refer the matter in dispute to foreign arbitration, and for the enforcement of foreign awards by Indian courts.

Legislative capacity with regard to the matters discussed in this chapter is almost entirely concurrent. Court fees in the Supreme Court are on the Union List[7]; in all other courts they are on the State List.[8] All other matters are on the Concurrent List.[9]

[7] Sched. 7, List 1, item 77.
[8] Sched. 7, List 2, item 3.
[9] Sched. 7, List 3, items 9, 12 and 13.

CHAPTER 15

LAWS AFFECTING CAPACITY AND STATUS

Acts Dealing with Minority and Wardship

The *Indian Majority Act* of *1875* does not apply to persons not domiciled in India, nor does it affect capacity of persons domiciled in India in respect of marriage, dower, divorce, adoption, or religious rites or usage; except in so far as other statutory rules have affected it, capacity in these matters is governed by the personal law. The age of majority is eighteen, except in the case of a person for whom or for whose property a civil court has appointed a guardian before he has attained that age, or whose property is under the superintendence of a Court of Wards; in the excepted cases, the age of majority is twenty-one.

The *Guardians and Wards Act, 1890*, enables a court to appoint or declare a guardian of property of any minor, and, except in the case of a married woman whose husband is not unfitted, or any other minor whose father is not unfitted, a guardian of the person. An application must be made by a relative or friend, or by the proposed guardian, or by the Collector. In making an appointment, the primary consideration is the welfare of the minor, but the court must consider the personal law, age, sex and religion of the minor, the propinquity of the proposed guardian, the wishes of a deceased parent, and, if the minor is old enough to express an intelligent preference, the wishes of the minor. The court may appoint the Collector by virtue of his office.

A guardian of the person may not, unless he is a testamentary guardian, remove the minor outside the territorial jurisdiction of the court without leave. If the minor leaves the guardian's custody, the court will only order his return if it is for the minor's benefit. A guardian of property is generally in the position of a trustee; he may not, without leave of the court, sell or charge the immovable property of the minor, nor lease it for more than five years, nor for a term going one year beyond the date of the minor's majority. A testamentary guardian may obtain leave of the court to deal with the minor's property in a way not sanctioned by the will, if he has been declared guardian by the court.

A guardian may be removed by the court for a number of specified reasons; having an interest adverse to the minor's is not

sufficient ground to remove a testamentary guardian unless the testator was unaware of the conflict of interest.

The Court of Wards Acts were enacted by provincial Legislatures at a time when wealth and power were mainly concentrated in the hands of agricultural landlords. Though expropriatory legislation has deprived such persons of most of their rights in land, the Acts remain in force, for their object is to preserve estates of all kinds. Under the Bombay Court of Wards Act, 1905, the Collector is the court of wards for his district but the State Government may appoint an officer or a board as court of wards for a Division or any part of the State. The court of wards may, with the sanction of government, take control of the estate of any land-holder or pensioner who is a minor or a female declared by the district court unfit to manage it. The court of wards may also take over the estate of a male so declared on grounds of physical or mental defect or indulgence in habits likely to injure the estate or the rights of inferior holders or a person judicially declared insane. A land-holder or pensioner may apply to have his estate placed under control of the court and this will be done if government is satisfied that it is in the public interest and that the estate is susceptible of economic management by the court of wards. The court may assume superintendence of the person of a minor or insane person other than a married woman. Where the Collector is not a court of wards, its powers may be delegated to him, and where he is the court of wards he may delegate to an assistant or deputy Collector. The court may appoint a manager of the estate and a guardian of the person. When assumption of control has been notified, the court calls for claims against the estate to be made within six months; failure to make a claim may result in the claim being deemed to have been met. Claims made are investigated and the court may admit or reject them, wholly or in part; it may propose a reduction of any claim or the interest payable and, if this is accepted, it is binding on the claimant. Pending execution proceedings against the ward or his estate are stayed until the court of wards certifies that the claim has been submitted to it. The court of wards determines the allowance payable to the ward and must manage the estate for his benefit. The sanction of government is necessary for a sale, exchange or mortgage of immovables or for a lease for more than ten years; in no case may more than one-third of the immovable property be sold or exchanged. If the execution of a decree would so reduce the property of the ward that the income would be insufficient to meet the costs of management and the ward's allowance, the court of wards may issue a certificate exempting the

estate from attachment for a prescribed period. The court will withdraw its control, in the case of an estate taken over at the request of the owner when government regards it as free from embarrassment, in other cases when the district court certifies that the grounds of disqualification have ceased to operate. Though in other States the corresponding legislation may differ considerably in detail, the basic principles are the same.

The Indian Lunacy Act

The Indian Lunacy Act of 1912, apart from its provisions for the establishment of mental hospitals and their inspection by visitors, contains provisions governing the placing of lunatics under restraint, and the deprivation of their powers to deal with their property.

An order for reception in a mental hospital may be made by a district magistrate or a sub-divisional magistrate; the application may be made by the spouse, or, if none, the nearest relative, and must be accompanied by two medical certificates. The magistrate must examine the alleged lunatic, and take such other evidence as he thinks necessary. Except in the case of a dangerous lunatic, an order will not be made unless the superintendent of the mental hospital is willing to receive him, and the cost of his maintenance is forthcoming. Mental hospitals are inspected by visitors monthly and a lunatic may be discharged on the certificate of three visitors, one of whom must be a medical practitioner.

A judicial inquisition into lunacy may be instituted in the High Courts of Calcutta, Madras and Bombay by a relative or the Advocate-General if the alleged lunatic resides within or has property within the territorial jurisdiction of a district court. It may be instituted by a relative or the Collector. The court may order the examination of the alleged lunatic. If the court finds the lunatic incapable of managing his affairs, but capable of managing himself, it may make such orders as it thinks necessary for the management of his estate, for instance, by appointing a manager with limited powers, and providing for the maintenance of the lunatic and his family, without making an order for the custody of the lunatic. The court may make orders for the performance of contracts, dissolution of partnership, and other similar matters.

Acts Relating to Marriage and Divorce

There is no general law relating to marriage. If the contracting parties are both Hindus, or both Muslims, they are, subject to certain statutory provisions referred to below, governed by their personal law.

Marriage and divorce of Parsis were dealt with by the Parsi Marriage and Divorce Act of 1865, now replaced by the Parsi Marriage and Divorce Act of 1936. A Parsi marriage is monogamous, and must be solemnised in the presence of two witnesses by a priest, who is obliged to certify it to a marriage registrar. The Act sets out the prohibited degrees, and requires, as a pre-requisite to the validity of a marriage, the consent of the guardian of a party who is under twenty-one.

A judge of a Presidency High Court or district court presides over a Parsi matrimonial court, but questions of fact are decided by a majority of the delegates sitting with him; delegates are appointed by the State Governor for ten years, after considering the views of the local Parsis.

A Parsi marriage may be declared null if consummation is impossible. Dissolution may be decreed if the respondent has not been heard of for seven years. A divorce may be granted if the respondent for one year after marriage wilfully refuses to consummate, or if, unknown to the petitioner, the respondent was insane at the time of marriage and has continued so up to the date of the suit, or if the respondent was, unknown to the petitioner, pregnant by another at the time of marriage, provided marital intercourse has not occurred after the petitioner became aware of the pregnancy. Other grounds for divorce are adultery, the commission of an unnatural offence, the causing of grievous hurt, the communication of venereal disease, compelling the wife to submit to prostitution, imprisonment under a sentence of seven years or more, desertion for three years, the lapse of three years without marital intercourse since a decree of judicial separation or a magistrate's order to pay maintenance, failure to comply for one year with an order for restitution of conjugal rights, and apostasy. There are prescribed periods of limitation varying from one to three years, according to the ground on which the petition is based. Many of the grounds for divorce in this Act were adopted with modifications in the Bombay Act of 1947 and the Madras Act of 1949 dealing with divorce among Hindus, and in the Hindu Marriage Act, 1955.

If one or both parties to a projected marriage are Christians, the marriage must be solemnised in accordance with the Indian Christian Marriage Act of 1872, but the Act will not validate a marriage forbidden by the personal law of either party. A clergyman who has received episcopal ordination and a minister of the Scots Kirk may solemnise marriages under the Act provided they comply with the rules and ceremonies of the Church to which they belong. Ministers of other Christian Churches must be licensed under the Act, and

comply with the detailed rules laid down in it. The Act also provides for civil marriages before registrars.

If a marriage is solemnised before a licensed minister or a registrar, notice must be given and published; if either party is a minor, the guardian's consent is necessary. If a person claiming to be guardian makes an objection to a licensed minister, the minister must satisfy himself that the objection is groundless before proceeding. If a similar objection is made to a registrar, it must be disposed of in the district court. Before a marriage can be solemnised before a licensed minister or a registrar, one of the parties must make a declaration that there is no impediment of kindred or affinity, and that any necessary consent has been obtained.

Except as between Roman Catholics, a marriage between Christians of Indian descent may be solemnised without notice in the presence of two witnesses by a person licensed to solemnise such marriages, provided that neither party has a spouse living, that the man is over sixteen and the woman over thirteen.[1]

The Act provides for the registration of all marriages solemnised under its provisions, and for the grant of copies of entries in marriage registers. It also prescribes for infringement of its provisions.

The Converts' Marriage Dissolution Act of 1866 was passed to deal with the problem arising when a married Indian was deserted by his or her spouse on account of conversion to Christianity. The deserted convert after six months can sue the other spouse for conjugal society. After proof of the marriage, and of desertion on account of change of religion, the respondent is interrogated; if he or she refuses to cohabit, and if the judge is satisfied that the cause is the petitioner's change of religion, the case is adjourned for a year. If the respondent is the wife, an interview between the parties is arranged in the presence of persons selected by the judge for the purpose of ascertaining whether her refusal is voluntary. If, at the resumption of the hearing, the respondent still refuses to cohabit, the marriage is declared dissolved. Though this Act is of little practical importance today, it is one instance of the increasing acceptance in India of the rule that change of religion is a ground for dissolution of a marriage.

The Indian Divorce Act of 1869 only applies if one of the parties is a Christian. A marriage cannot be dissolved under the Act unless the parties are domiciled in India; a decree of nullity can only be sought if the marriage was celebrated in India and the petitioner is

[1] If the bridegroom were under eighteen or the bride were under fifteen, though the marriage would be valid, the penalties under the Child Marriage Restraint Act, 1929, would attach to the licensee and others concerned, but not to the bride.

resident in India; a decree for judicial separation or for restitution of conjugal rights can only be granted if the petitioner resides in India. The provisions of the Act are based on the English law of the time of its enactment, and the provisions of the English Act of 1937 have not been enacted in India. The procedure laid down in England in matrimonial causes is generally followed, except that while district courts as well as the High Courts have jurisdiction, a decree nisi of a district court can only be made absolute by a High Court, and a district court's decree of nullity must be confirmed by the High Court. The provisions of the Act for the appointment of an officer —usually the Advocate-General—to perform the functions of the Queen's Proctor are ineffective.

A husband may obtain a decree for divorce on the ground of his wife's adultery; a wife may be granted a decree if the husband apostatises from Christianity and goes through a form of marriage with another woman, or if he commits adultery combined with cruelty or desertion for two years, or if he commits incestuous adultery, or bigamy with adultery, or rape, or an unnatural offence.

The object of the Special Marriage Act, 1872, was to provide a form of marriage to persons who did not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jain religions. Its provisions for solemnisation before a registrar, notice and disposal of objections were similar to those in the Christian Marriage Act, 1872, relating to marriage before a registrar. The courts held that a false declaration by a party as to his religion did not invalidate a marriage and that a declaration that he was not a Hindu did not involve a renunciation of his personal law. Advantage was not uncommonly taken of the Act by Hindus to overcome difficulties in their personal law of marriage and the scope of the Act was extended by an amendment in 1923 to cover a marriage between persons, each of whom professed one or other of the Hindu, Buddhist, Jain or Sikh religions. Adherents of these religions were governed by almost identical family law and, if they married under this Act, they avoided the prohibitions of their personal law against marriage between *sapindas*,[1] and members of the same *gotra* or *pravara*.[2] They were only subject to the prohibited degrees, which permitted marriage between persons related beyond the fifth degree. Age was irrelevant in a marriage under Hindu law but the Act required the bride to be fourteen and the bridegroom eighteen; if either party was under twenty-one, the consent of the guardian was

[1] *Sapinda* is explained on p. 269

[2] A *gotra* includes all the descendants of one of the *rishis* (ancient sages). Descendants in the male line of the three paternal ancestors of the founder of a *gotra* belong to the same *pravara*.

required. The Act imposed monogamy on those who took advantage of it and the marriage could only be annulled or dissolved under the Indian Divorce Act, 1869. The marriage separated the bridegroom from the other members of the joint family and deprived him of the right to adopt. His rights of inheritance in his own family were preserved but succession to his own property was governed by the Indian Succession Act, 1925.

This Act was repealed by the Special Marriage Act, 1954, which was intended to provide a form of marriage irrespective of religion for persons in India and for Indian citizens abroad. A marriage can be solemnised under it if neither party has a spouse living or is insane, if the bride is eighteen and the bridegroom twenty-one and if the parties are not within the prohibited degrees. It is solemnised before a marriage officer, after notice and the hearing of objections, if any. Marriages under the Act of 1872 are deemed to have been solemnised under the Act and the marriage of persons coming substantially within the purview of the Act may be registered under it and are then deemed from the date of registration to have been solemnised under it. The Act deals with matrimonial causes. Either party may sue for restitution of conjugal rights if the other has withdrawn from his or her society without reasonable cause. Judicial separation may be decreed against a spouse who has committed adultery or been in desertion for three years or undergone three years out of a term of seven years' imprisonment or been guilty of cruelty or been of incurable unsound mind for three years or not been heard of for seven years. A decree of nullity may be granted against a party who has wilfully refused to consummate or obtained consent to the marriage by coercion or fraud or who was pregnant by a third party at the time of marriage. But if the ground is coercion or fraud, proceedings must be instituted within a year of the coercion ceasing or the fraud being discovered and relief will not be granted if the petitioner has continued to cohabit after the coercion ceased or the fraud was discovered; pregnancy is only an effective ground, if the petitioner was ignorant of it at the time of marriage, if proceedings were instituted within a year of marriage and if there has been no intercourse since discovery. The grounds for judicial separation set out above are also grounds for divorce; failure to resume cohabitation for two years after a decree for judicial separation and failure to comply with a decree for restitution within the same period are also grounds for divorce. A wife may obtain a divorce if the husband commits rape, sodomy or bestiality. Divorce by mutual consent is also possible but the spouses must live apart for a year before filing the petition and the

decree may not be granted before another year has elapsed nor after two years. No petition for divorce may be presented within three years of marriage without special leave on the grounds of exceptional hardship to the petitioner or exceptional depravity of the respondent.

Minority, lunacy, marriage and divorce are on the Concurrent List.[4] Courts of Ward for the estates of Indian Princes are on the Union List,[5] other Courts of Wards are on the State List.[6]

[4] Sched. 7, List 3, items 5 and 16
[5] Sched. 7, List 1, item 34.
[6] Sched. 7, List 2, item 22.

CHAPTER 16

PERSONAL LAW OF HINDUS AND MUSLIMS

Matters to which the Personal Law Applies

One of the Directive Principles of State Policy is that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. When this was under the consideration of the Constituent Assembly, amendments were moved by Muslim members to add a clause saving their personal law. Though these were negatived, there seems no reason to assume that there are any grounds for Muslim apprehension. There seems little likelihood of a Legislature interfering with the personal law of Muslims in matters in which it prevails, except in response to Muslim pressure.

The matters in which the courts apply the personal law of Hindus and Muslims are partly set out in statutes, and partly determined by the courts' interpretation of "justice, equity and good conscience." The Hindu law is applicable to Hindus by birth or religion who have not formally apostatised, to Buddhists, Sikhs and Jains, in matters of succession, inheritance, marriage, religious usage and institution, adoption, minority, guardianship, family relations, wills, gifts, and partition. The Muhammadan law is applicable to adherents of Islam in matters of succession, inheritance, marriage, dower, dissolution of marriage, family relations, minority, guardianship, pre-emption, gifts, *wakfs*, religious usage, and institutions. Custom, whether of a family, district or sect, if ancient, certain, reasonable, and not opposed to morality, public policy or statute, will, however, override the personal law of the community to which the person relying on it belongs. The personal law can be abrogated by statute.

The Sources of Hindu Law

When, in 1773, the district courts of Bengal began to apply the Hindu law, it was laid down by a Hindu law officer called the *pandit*, an arrangement which continued until 1864. Warren Hastings once said, "The writers of Indian philosophy will survive when British domination of India shall long have ceased to exist, and when the sources which yielded wealth and power will be lost to remembrance," and, as early as 1775, under his direction, a collection of rules were compiled in Sanskrit by eleven Bengal *pandits*, translated into Persian, and then into English by Halhead, a Company's

servant. This compilation is now only of historical interest as the starting-point of research by European and Indian scholars, who translated and commented on the Sanskrit works which became the literary sources of Hindu law as administered by the courts.

The most important literary sources of Hindu law are the *Dharmasastras*, which include *Manu* (between the second century B.C. and the second century A.D.), *Yajnavalkya* (between the first century B.C. and the third century A.D.) and *Narada* (between the first and the fourth centuries A.D.), and the Commentaries, of which only Vijnaneswara's *Mitakshara* (c. A.D. 1100) and Jimuta Vahana's *Dayabhaga* (thirteenth century A.D.) can be mentioned. The *Dayabhaga's* rules prevail in Bengal, and the *Mitakshara's* in the rest of India, but there are *Mitakshara* sub-schools of law created by the local application of rules from other Commentaries. This necessitates the rule that a migrant from one to another part of India and his descendants remain subject to the law of his original domicile until he or they have identified themselves with the local inhabitants in his new place of abode.

The Sanskrit texts were not intended to be a code of laws to be administered by courts of the type set up by the British; they do not distinguish between legal, moral and religious precepts, and they conflict. The courts followed the rules in the Commentaries, where they conflicted with the rules in the *Dharmasastras*; as between conflicting rules in the Commentaries, they chose that generally accepted in the local area concerned, and applied a similar test in distinguishing legal principles from religious or moral exhortations, but the selected rules had to be such as could be enforced by the procedure of the courts, and some had to be so adapted so as to conform to what were regarded as fundamental rules of justice, a process which sometimes almost inverted the rule. Despite the overriding effect of custom and the conflicting rules of the different schools and sub-schools, the courts imposed a high degree of uniformity, and applied the law they developed to thousands who must have been totally ignorant of it.

The development of the Hindu law by the courts was necessarily restricted. A clear rule of law in a text was often held binding, notwithstanding that informed Hindu opinion regarded it as archaic or obsolete. The only effective method of bringing the law into line with modern social development was amendment by statute, and, until the Indian Legislatures became representative assemblies, they could only be induced by the strongest pressure to contemplate legislation on so delicate a subject. When, however, the elected Hindu legislator was in a position to make his influence felt, the

slow trickle of enactments on the subject threatened to swell into a mighty and uncontrollable flood, so that the Central Legislature was obliged to commit itself to the principle of general codification of the Hindu law. The original proposal was a Code covering most of the personal law but eventually four statutes, the *Hindu Marriage Act*, 1955, the Hindu Succession Act, 1956, the Hindu Adoption and Maintenance Act, 1956, and the Hindu Minority and Guardianship Act, 1956, were enacted. Except for the joint family and endowments, they cover most of the field and they apply prima facie to every person domiciled in India who is not a Muslim, Christian, Parsi or Jew. They have been hailed as a step in the direction of the uniform civil code for all citizens. They have certainly robbed the law of much of its *Sastric* character and substituted something comparable to the family law of a western European country.

The *Sastric* law is basically Aryan patriarchal law. It differs from the laws of the Western Aryans in that it has retained many features suitable to an agricultural people which have been obliterated or concealed in Western law by absorption of principles developed in the City, and by the imposition of the feudal system. In the counter-attack against Buddhism, with its emphasis on withdrawal from temporal activities, the Brahmin writers went to the opposite extreme, assigning to every mortal act a religious significance. The consequence was that, after a religious reason had been assigned to a purely secular act, *e.g.*, a childless man must adopt to save his soul from Hell, the rules governing the act had to conform to the religious basis of the act, *e.g.*, the adoptee must be the reflection of a son. Differences from the rules governing an act in a system of law which regarded the same act from a purely secular point of view were inevitable.

Caste

There are four castes of Hindus—*Brahmins*, *Kshatriyas*, *Vaisyas*, and *Sudras*. The first three castes probably originally comprised the Aryan invaders and their descendants, the *Brahmins* being the priests, the *Kshatriyas* the warriors, and the *Vaisyas* the merchants and husbandmen; the *Sudras* were the victims of Aryan imperialism. In earlier centuries of the history of India, it would seem that caste barriers were less rigid than they have been during the British period in India. The *Brahmins* were to study and teach the sacred law; the other two twice-born castes,[1] the *Kshatriyas* and *Vaisyas*, were obliged to learn it. There are, consequently, slight differences

[1] Twice-born because these castes alone are regenerated in adolescence by assuming the sacred thread

in the *Sastric* law applicable to the twice-born castes from that governing *Sudras.*

Hindus are subject to caste discipline. There are no all-India caste organisations, but the members of a particular caste or sub-caste in a particular locality are usually born subject to the control of a caste organisation which may be controlled by an autocratic hereditary head, or by a *panchayat*, or in other ways. These caste organisations enjoy at least as much autonomy as an English club, though they differ from a club in that their members acquire their rights and liabilities by birth, whereas the members of an English club acquire their rights and liabilities by contract. In the British period the English law of clubs was applied to caste questions.[1] To establish his claim to redress in a court, a person who had been outcasted would have to show that a civil right was involved and that the rules of natural justice had been infringed. But the official attitude to caste is changing. It is ignored in the Hindu Code and the Bombay Prevention of Excommunication Act, 1949, not only makes void any act of a caste tribunal depriving a member of a civil right but also provides criminal punishment for anyone who participates in it.

The Hindu Joint Family

The most distinctive feature of Hindu law is the Joint Family. The law governing it and its property is a development of the Aryan law of the patriarchal family, and several steps in this development can be traced in texts in the *Sastras*. Starting from a point where the patriarch was the absolute owner of all the family property, and despotic ruler, with powers of life and death over his descendants, the course of development has reduced the patriarch to manager, has given other members of the family legally enforceable rights, and has recognised the separate property of individual members of the family.

A Hindu joint family consists of all descendants of a common male ancestor, all persons adopted into the family, with their issue, and all women who have married into the family, excluding those who have separated and women who have married into another family. A Hindu family is presumed joint, but second cousins are usually separate.

Within the joint family is a narrower body called the coparcenary: it is with regard to the constitution of this body that the *Dayabhaga* school differs radically from the *Mitakshara* school. At *Mitakshara* law a coparcenary begins with a man, his sons, son's sons, and son's

[1] *Nathu v. Keshawji*, I.L.R. 1901 26 Bom. 174

son's sons; upon these descendants will fall the duty, when performing the *sradh* ceremony after his death, of offering his spirit a whole funeral cake, and, whichever is regarded as cause and whichever effect, the duty to make the funeral oblation and the right to participate in ancestral property go hand in hand. A more remote descendant enters the coparcenary when he comes within four degrees of the head of his stock (counting himself and the head of his stock each as one degree), provided that a break of more than three degrees had not occurred between him and the ancestor whose death would otherwise bring him within the coparcenary. At *Dayabhaga* law, the coparcenary consists of those unseparated members who have inherited as or from agnate male descendants of a male, and, unlike the *Mitakshara* coparcenary, it may include females. Every coparcener at *Mitakshara* law is a joint-tenant of the whole joint family property; while he remains joint, he cannot say that he has any particular share, for what he would get on partition is liable to be increased by the death of other coparceners, and to be decreased by the birth of new coparceners; coparceners at *Dayabhaga* law are tenants-in-common with definite fractional shares which do not fluctuate in this way.

The affairs of a joint family are conducted by the manager, usually the senior agnate; he is bound to provide for the maintenance of the members of the joint family, but his discretion in the application of the family income is almost unlimited; a dissatisfied coparcener's remedy is to demand partition. In charging or disposing of the corpus of the joint family property, the manager's powers are more limited; he may only do so for legal necessity, which includes meeting such liabilities and incurring such expenses as Hindu opinion deems proper, or for the benefit of the estate, which excludes speculative operations.

While a coparcener's undivided interest is liable to be taken in execution for his private debts, a *Mitakshara* coparcener may not, except with the consent of the other coparceners, make a gift of his undivided interest, nor, except in Western and Southern India, may he sell or mortgage it. Previously he could not dispose of it by will but the Hindu Succession Act, 1956, presumably as a step towards the abrogation of the joint family law, provides that, if a coparcener dies, leaving a female or cognate heir of the first class,* his coparcenary interest will devolve, not by survivorship as before the Act but on the heirs to his separate property specified in the Act, unless disposed of by will. There has never been any restriction on disposal of property by will at *Dayabhaga* law.

* See p. 267.

A Hindu joint family may carry on a business to which the ordinary rules of partnership do not apply. If a stranger is admitted into the business, his relations with the joint family are governed by the rules of partnership, whereas generally the rules governing other joint family property govern the relations between the members of the joint family *inter se*, but a manager cannot impose upon a minor coparcener the burdens of a new business.

The limitations on the manager's right to deal with the corpus of the joint family property would impose an intolerable risk upon a purchaser or mortgagee but for an equitable principle engrafted by the courts on the pure Hindu law, which protects him, provided he has acted honestly, made proper inquiry, and satisfied himself of the existence of a legal necessity to support the transaction. To advance money to a Hindu joint family which has minor coparceners for the purpose of starting a new business remains a hazardous transaction.

As a Hindu is liable to suffer punishment after death for not paying his debts, his sons, son's sons, and son's son's sons are under a pious obligation to pay such of his debts as are not tainted with immorality or illegality. According to the texts, this obligation is personal, and unlimited, but does not arise until the ancestor is dead. The courts, however, at *Mitakshara* law, have limited the liability to the extent of joint family property received from the ancestor, and extended its incidence so as to make it enforceable during the ancestor's lifetime. A father can, therefore, at *Mitakshara* law, dispose of his son's interest in joint family property in satisfaction of his untainted personal debt, and render his son's interest liable to be taken in execution for such a debt. This rule does not apply at *Dayabhaga* law, as the son has no interest in his father's property in his lifetime, and, after his death, he is liable to discharge any legally enforceable debt of his father up to the extent of what he has inherited from him.

Partition of status is effected by a coparcener communicating an unambiguous intention to separate. At *Mitakshara* law, this gives the coparcener, or his successors, the right to have his share determined, ascertained, and delivered; each son takes a share equal to the father; each branch of the family takes an equal share, and the coparceners of each branch take equally among themselves. At *Dayabhaga* law the share available to a separating coparcener has already been fixed by the law of inheritance, so that, whereas at *Mitakshara* law partition means the ascertaining of the fractional share to which the separating coparceners are entitled, at *Dayabhaga* law it means actual division of the property by metes and bounds.

Before the joint family property is divided on partition, provision

must be made for discharge of debts and the maintenance of members who are not coparceners. Division of the property may be effected by agreement, by arbitration, or by suit. A suit filed on behalf of a minor coparcener will not be decreed unless it is shown to be for the minor's benefit.

The *Mitakshara* joint family law has served a useful purpose in keeping together agricultural families, but its restrictions are now irksome to members of a family engaged in commercial transactions or following professions. It was the development of commercial activity in Bengal which called into existence the rules of *Dayabhaga* law. The Gains of Learning Act of 1930 was necessary to abrogate the rule that the earnings of a professional man, educated at joint family expense, were joint family property. The Hindu Women's Rights to Property Act, 1937, while not making a *Mitakshara* widow a coparcener, gave her the right to demand partition and to receive the share her deceased husband would have been entitled to at his death, but she only got a woman's limited estate. This Act was repealed by the Hindu Inheritance Act, 1956, which turned all such limited estates not created by deed, will or decree into absolute estates, provided the woman was in possession, actual or constructive. It is still possible to create a limited estate by deed, will or decree but not by operation of law.

Inheritance

Regarding the rules of inheritance to males, there was a cleavage in principle between the *Mitakshara* and the *Dayabhaga* schools. Apart from the fact that the *Dayabhaga* rules applied to the share of a deceased coparcener in joint family property as well as to his separate property, whereas the *Mitakshara* rules applied only to separate property, the main rule in *Mitakshara* law was that the separate property of a deceased person devolved on his nearest agnate, while the *Dayabhaga* rule was that the person competent to confer the greatest spiritual benefit on the deceased inherited his estate. At the *sradh* ceremony, a man prepares a funeral cake of grain, which he offers to his three immediate male ancestors, his father, father's father, and father's father's father: he then offers the portions of the grain adhering to his hands to the next three ascending paternal male ancestors: the water with which he removes the grain adhering to his hands is offered to the seven paternal male ancestors beyond them. There are thus three kinds of oblation, conferring descending degrees of spiritual benefit. Connected with the custom, long since obsolete, that a sonless man could appoint a daughter, whose sons should be regarded as his issue, a man also

makes similar oblations to his maternal male ancestors, but these have less spiritual efficacy than those made to paternal ancestors. The relationship between offeror and offeree, and between offerors to the same person, at this ceremony, was mutual for purposes of inheritance, but the person who is competent to offer an oblation to the deceased had a stronger claim to inherit than him to whom the deceased was competent to make one, or him who makes an offering to a common ancestor. Starting from this basis, the *Dayabhaga* law divided a deceased person's relatives into three classes, and rules were evolved to place the members of each class in order of preference. The claim to inherit, based on the duty of offering oblations to maternal ancestors, meant that, at *Dayabhaga* law, some cognates came in before they did at *Mitakshara* law, which, making an exception in the case of the daughter's son, exhausted the agnates before the cognate relations were considered in order of propinquity. Places are found for the widow, daughter and ancestresses on ground of spiritual benefit.

Notwithstanding the different starting points, in both *Mitakshara* and *Dayabhaga* law, those more closely related to the deceased inherited in nearly the same order. At *Dayabhaga* law, the son, the son of a predeceased son, and the son of a predeceased son of a predeceased son, first inherited together, then, in order, the widow, the daughter, the daughter's son, the father, the mother, the brother, the brother's son, and the brother's son's son; reversing the positions of father and mother, the order was the same at *Mitakshara* law. When the succession of relatives more remote than these was under consideration, different rules applied in Bengal, in Bombay, and in the rest of India.

There has been a growing feeling among articulate Hindus that neither scheme has a satisfactory basis, and the tendency of statutory amendments of the law has been to introduce the principle that the right to inheritance should be determined by the degree of natural affection the deceased, having regard to human experience, should be deemed to have for the beneficiary; in particular it was deemed equitable to give enhanced rights of inheritance to women. The Hindu Law of Inheritance Amendment Act of 1929 accelerated at *Mitakshara* law the rights of the son's daughter, the daughter's daughter, the sister, and the sister's son. These took in that order after the paternal grandmother and paternal grandfather, who followed the brother's son's son.

The Hindu Women's Rights to Property Act, 1937, placed the widow in the same position as the son, and also gave the widow of a

predeceased son and the widow of a predeceased son of a predeceased son rights of inheritance together with the first three generations of male descendants. Under the Hindu Succession Act, 1956, there is a first class of heirs, the members of which take together in preference to others. These include the preferential heirs under the *Sastric* law, as amended by the Act of 1937, the son, son of a predeceased son, son of a predeceased son of a predeceased son, the widow, son's widow and widow of a son of a predeceased son. But the Act of 1956 also includes in this class the mother, all children, all grandchildren representing a deceased parent and the daughter of a predeceased son of a predeceased son. If there is no heir of the first class, the estate goes to the preferential heir of the second class, if any. This class is divided into nine items; the heirs in each item take together *per capita* and exclude heirs in any subsequent item. The items are (i) the father, (ii) brothers, sisters, and the great-grandchildren related through the son not in the first class, (iii) great-grandchildren related through the daughter not in the first class, (iv) nephews and nieces, (v) paternal grandparents, (vi) widows of the father and brother, (vii) paternal uncles and aunts, (viii) maternal grandparents, (ix) maternal uncles and aunts. Failing an heir of either class, the nearest agnate succeeds and, in default, the nearest cognate; the heir with fewest or no degrees of ascent is preferred; if these are equal the heir with fewest degrees of descent succeeds; if these also are equal, they take together.

Except in Bombay, where females inheriting to members of the family of their birth took an absolute estate, a female heir took a limited estate. She could dispose of the income as she pleased; but she could only sell or charge the corpus for legal necessity or the benefit of the estate. In the case of the widow, however, legal necessity included expenditure on ceremonies essential to the salvation of her deceased husband's soul. On the death of a limited owner, the estate passed, not to her heirs, but to the nearest reversioner, *i.e.*, the next surviving heir of the person from whom she inherited it.

Under the Hindu Widows Remarriage Act, 1856, if a Hindu widow remarries, all rights of maintenance and inheritance in the property of her deceased husband and of his lineal successors cease, and she may be deprived of the guardianship of his children on an application by a relative of her deceased husband.

Before the Act of 1956 various kinds of *stridhan* (women's peculium) were recognised; the rules governing power of alienation and rights of succession were somewhat complicated. All such property is now the woman's absolute property; she can dispose of

it *inter vivos* or by will. It devolves in the first instance on her husband and children; failing them it goes to her husband's heirs: if none, on her parents; if there is no parent, it goes to her father's heirs; failing any such, her mother's heirs take. But, in the absence of husband and children, property inherited from her parents goes to her father's heirs and property inherited from her *husband or* father-in-law to her husband's heirs.

Hindu Wills

The *Sastras* contain rules regarding gifts, and other material from which testamentary power could have been developed, but, before the British period, joint family property being the rule, and separate property exceptional, there was little to encourage its development. In 1832 the practice of granting probate of Hindu wills began in the Supreme Courts, and by 1862[4] the Judicial Committee of the Privy Council held that testamentary power had been long recognised and was completely established. Recognition of testamentary power raised the questions of formalities essential to the validity of wills, the conditions which could be attached to bequests, and the limits within which a testator could determine the destination of his property. As there was little help to be received from the texts beyond the rule that acceptance by a donee was necessary to the validity of the gift, the law covering these questions has been evolved by the courts and by statute. At first no formalities attached to a will, but the Hindu Wills Act, 1870, which applied only to the Presidency Towns and Bengal, required wills to be in writing, and attested in the manner now specified in the Indian Succession Act, 1925. This provision was extended to all wills made on and after January 1, 1927. By 1862 it had been decided[5] that the testamentary power was not limited to creating absolute estates; it was possible to make a bequest for a limited period, such as a term of years or for life, followed by a grant of the remaining interest; it was also possible to make a bequest subject to a condition being fulfilled, such as a grant to A if he marries B. In 1872[6] it was held that property might be left on trust, but not so as to create an estate unknown to Hindu law, such as a grant in tail male, and not so as to create an interest in favour of an unborn person. Commencing in 1914[7] legislation in the Indian Legislatures progressively

[4] *Sreemutty* v. *Denubundo* (1862) 9 M.I.A. 123.
[5] *Ibid*
[6] *Tagore* v. *Tagore* (1872) I.A. Sup. 47.
[7] The Hindu Transfer and Bequests Act, 1914, applied to the Madras *muffasal*; the Hindu Disposition of Property Act, 1916, applied to India excepting the Madras Presidency, and the Hindu Transfer and Bequests (City of Madras) Act, 1921, appled to the City of Madras.

extended over India the rules that a bequest to an unborn person, following one of the same property for a limited period to another person, was valid, if it comprised the whole of the remaining interest in the property, and provided the will did not infringe the perpetuity rule, which permits a testator to tie up property for the lives of persons living at the date of his death and afterwards for the minority of the unborn person to whom the remaining interest in the estate is to pass. These and other rules affecting conditions attached to transfers of property by will are now embodied in the Indian Succession Act of 1925, and are applicable to all Hindu wills; the rules are the same as those for transfers *inter vivos* contained in the Transfer of Property Act, 1882.

Marriage

At *Sastric* law marriage was a sacrament and indissoluble, polygamy being permitted but not polyandry. An insane or impotent person was not competent to marry; nor was a widow until the enactment of the Hindu Widows' Remarriage Act, 1856. Minority was irrelevant; the Child Marriage Restraint Act, 1929, while not affecting the validity of such marriages, provided criminal penalties for a husband over eighteen who married a girl under fifteen and for the parents, guardians and officiating priest, if a bridegroom was under eighteen or a bride under fifteen. The bride had to be given by her preferential marriage guardian, her father if alive and competent but, if a girl were married without such consent, the marriage would not be set aside without proof of force or fraud. It was necessary that the parties should belong to the same caste but in Bombay a man might marry a woman of a lower caste. The Hindu Marriages Validity Act, 1949, retrospectively validated inter-caste marriages and marriages between Hindus, Jains and Sikhs. A man might not marry a girl belonging to the same *gotra* or *pravara* until the enactment of the Hindu Marriage Disabilities Removal Act, 1946. *Sapindas* could not marry; beginning with the boy and girl and counting upwards, inclusive of each, seven or five degrees according as their relationship to the common ancestor was through the father or mother, if the common ancestor was not reached, they were not *sapindas* and could marry. If a spouse withdrew from the society of the other without reasonable cause, the court, in its discretion, would decree restitution of conjugal rights. The Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, repealed and re-enacted in the Hindu Adoption and Maintenance Act, 1956, provided that a wife was entitled to maintenance unless she was unchaste or changed her religion, and was entitled to

live separately and be maintained if her husband deserted her, wilfully neglected her or treated her cruelly; she was similarly entitled *if her husband suffered from virulent leprosy, had another* wife living, kept a concubine, ceased to be a Hindu or for any other justifying cause.

The Bombay Prevention of Bigamous Marriages Act, 1946, the Bombay Divorce Act, 1947, and the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, have been repealed and to a considerable extent re-enacted by the Hindu Marriage Act, 1955. This Act, while maintaining the validity of child marriages, preserved the penalties in the Child Marriage Restraint Act and provided penalties for marrying of a girl without the consent of the preferential guardian. Marriages in which either party had a spouse living or between *sapindas* or between parties within the prohibited degrees are void and may be annulled by decree of court. The scope of *sapindaship* has been curtailed so as not to extend beyond the fifth degree counting through the father and the third counting through the mother. This was deemed to justify the innovation of the prohibited degrees; one may not marry a lineal descendant, the spouse of a lineal ascendant or descendant, the wife of the brother, father's or mother's brother or grandfather's or grandmother's brother of the other, a brother, sister, uncle, niece, aunt, nephew or first cousin. The marriage may be solemnised according to the rites of either party, but if the ceremony of *saptapadi*[*] is performed, that is effective with the seventh step. The Act empowers the State Governments to provide for registration of marriages under the Act, either optional or compulsory.

The Act puts the discretionary remedy of restitution of conjugal rights on a statutory basis. If the petitioner satisfies the court that the respondent left without reasonable cause, the only possible answer is one of the grounds of judicial separation, nullity or divorce. A decree of judicial separation may be had on grounds of desertion for two years, cruelty, virulent leprosy continuing for a year, communicable venereal disease continuing for three years, insanity continuing for not less than two years or adultery. A decree of divorce may be granted if the respondent is living in adultery, has ceased to be a Hindu, has been incurably insane for three years, has suffered for the same period from virulent and incurable leprosy or communicable venereal disease, *has not been heard of for seven years*, has not resumed cohabitation for *two years since a decree for* judicial separation or has failed to comply with a restitution decree for the same period. A husband who had two wives before the Act came

[*] Taking seven steps together round the sacred fire.

into force is liable to be divorced on the petition of either, provided both are alive. A wife is also entitled to a decree if her husband commits rape, sodomy or bestiality. A petition for divorce cannot be filed within three years of marriage except with special leave on the ground of exceptional hardship to the petitioner or exceptional depravity of the respondent. Customary rights of divorce and rights under special laws not repealed are saved.

In certain circumstances a marriage is voidable; a decree of nullity can be obtained by either party if the other party was at the time of marriage and still is impotent, if either party was insane at the time of marriage, if the consent of the petitioner or, in the case of a bride under eighteen, of the guardian, was obtained by force or fraud or if the respondent was pregnant by a third party at the time of marriage. A petition based on force or fraud must be filed within a year of the force ceasing to operate or the fraud being discovered, and the right is lost if the petitioner has consented to continue cohabitation after the force has ceased to operate or the fraud has been discovered. A petition based on the pregnancy of the bride must be filed within a year of marriage; the petitioner must satisfy the court that he was ignorant of the pregnancy at the time of marriage and has had no intercourse with the bride since discovering it.

In all matrimonial causes, apart from being satisfied that grounds for relief exist, the court must be satisfied that the petitioner is not taking advantage of his own wrong, that the petition is not collusive and there has been no unnecessary or improper delay. If adultery is pleaded, it must be shown that the petitioner has neither connived at nor condoned the act; if cruelty is pleaded, it must be shown that there was no condonation.

The Act provides that either spouse without sufficient income may be awarded maintenance *pendente lite*. At or after decree permanent alimony or maintenance may be awarded and the order rescinded or varied when there is a change of circumstances. There is also power to make orders for custody of children. Notwithstanding a decree of nullity, children of the marriage are legitimate for the purpose of inheriting from their parents.

Adoption

The *Sastric* law of adoption was based on the religious duty owed by every Hindu to his ancestors to provide for the continuation of the line and the perpetuation of the performance of the *sradh* ceremony. The adoptee must be the reflection of a son; only males could be adopted and only to a male having no living male

descendant, begotten or adopted. In parts of Bihar a widow could not adopt; elsewhere the conditions under which she could, varied. In Western India she could adopt to her husband unless he had forbidden it; elsewhere she could adopt if authorised by her husband. In Southern India, unless her husband had forbidden it, she could adopt with the consent of his relations. The widow's power continued until her death unless a son of her husband died leaving a son or widow. An adoption by a widow related back to her husband's death.

The adoptee had to be of the same caste as the adoptive father and, except among *Sudras*, he had to be the son of a woman with whom the adoptive father might have contracted a valid marriage. Except in Western India and the Punjab, where it was allowed by custom, a married man could not be adopted. An orphan could not be adopted. The disabilities as to marriage and as to adoption in the family of his birth continued after the adoption and he became subject to additional disabilities in these respects which would have attached to him if he had been born in the adoptive family. He lost his rights of succession to property in the family of his birth and acquired, in the family of his adoption, rights he would have had if he had been born in it, but in competition with a son subsequently born to the adoptive father, his right to inherit from his father and his right to a share on partition were cut down.

The Hindu Adoption and Maintenance Act, 1956, applies to all adoptions since it came into force. Both parents have an equal say in giving a child in adoption; neither may give the child without the other's consent, unless that other is dead or insane or has changed his religion or renounced the world; where there is no parent capable of giving the child, a guardian may be appointed for the purpose by the court. The adoptee must not have been previously adopted and, unless there is a custom to the contrary, he must be under fifteen and single. The adoptee may be male or female.

The adoptor must be a major and of sound mind. A male, who has a wife living and capable of consent, cannot adopt without her consent. A female who is unmarried or whose marriage has been dissolved or whose husband is incapable of consent may adopt. The adoptive parent may not adopt a boy if he has an agnate male descendant nor a girl if there is a daughter or son's daughter. If adoptor and adoptee are of opposite sexes, there must be twenty-one years difference in age between them.

The adoptee is deemed to be the child of the adoptive parents for all purposes. Ties in the family of birth are replaced by new ties in the adoptive family but the adoptee cannot marry anyone

he or she could not have married in the family of birth. Property already vested in the adoptee remains vested, subject to existing rights of maintenance; the adoptee cannot divest any person of property vested before adoption.

Muhammadan Law

The personal law of Muslims is not indigenous to India; it obtains over a vast area of the earth's surface. As its main principles are more easily ascertainable, and as it was actually being administered in *Kazi's* courts in India when the British assumed political responsibility, it was not susceptible of a development in India comparable to that which Hindu law has undergone during the British period. The Muhammadan law of India, by incorporation of customs, shows some variations from the *Sharia*, and there are anomalous Muslim communities of Indian converts, such as the Cutchi Memons, who usually retained the Hindu law of succession and inheritances, but followed the Muhammadan law in other matters. Within the sphere to which the personal law applies, the tendency has been less to develop the law by statute than to erase by enactments differences between the law of India and the *Sharia*. The Cutchi Memons Act of 1920 empowered any member of the eponymous community to make a declaration, whereafter he, his minor children and their descendants, would be governed by the *Sharia* in matters of succession and inheritance, instead of by the Hindu law; an Act of 1938 made this change for the whole community, whether they had made declarations or not. The Shariat Act, 1937, enabled any Indian Muslim to make a declaration, after which the *Sharia* would apply to him, his minor children, and their descendants in regard to adoption, wills and legacies. Without any such declaration, the *Sharia* would apply to Indian Muslims in the other matters governed by the personal law. The last two, being Central Acts, do not affect devolution of agricultural land.

Of the four *Sunni* or orthodox schools of law, the *Hanafi* school is followed by most Indian Muslims, but there are followers of the *Shafi'i* school. There is also a not inconsiderable number of Indian Muslims who are *Shias*; their law differs in many respects from that of the *Sunni* schools.

It is not possible to do more than indicate some of the more obvious differences between the personal laws of Muslims and Hindus. There is no caste among Muslims, nor, except among some of the anomalous communities, is there coparcenary property. A Muslim's testamentary power is limited to one-third of his net estate; wills require no formalities; a bequest to an unborn person is void.

The scheme of inheritance is entirely different; a deceased person's estate may devolve upon a number of relations standing in different relationships to the deceased, in unequal but certain shares. Marriage is contractual; a man may have four wives at one time; he may divorce a wife without assigning cause; though the intervention of a court is not essential, there is inevitably a great deal of learning on the subject of divorce. Adoptions are not recognised by the *Sharia*.

The Dissolution of Muslim Marriages Act, 1939, gave a married Indian Muslim woman the right, not recognised in *Hanafi* law, to a judicial divorce on account of her husband's cruelty, immoral conduct, or interference with her property, but it laid down, contrary to the view previously held by the courts, that her apostasy does not, *ipso facto*, dissolve the marriage.

Though under the Constitution Act of 1935, devolution of agricultural land was on the Provincial Legislative List, the position has been changed by the Constitution. All matters in which parties in judicial proceedings were subject to their personal law are now on the Concurrent List.*

* Sched. 7, List 3, item 5.

Chapter 17

LAWS RELATING TO PROPERTY

The Indian Succession Act

Although the personal law of Hindus and Muslims provided rules governing succession to their property at death, the early *muffassal* courts of British India had no rule other than "justice, equity, and good conscience" to guide them when dealing with questions of succession on death to the property of persons who did not adhere to either of these two religions. The number of cases in which such questions arose, and the diversity of answers which the courts gave to those questions, drew attention to the necessity of the early enactment of a Code dealing with such matters.

The revenue settlements had called into existence transferable rights in land. Though English land tenures and conveyancing practice were obviously inapplicable in India, rules had to be made for transfers between living persons which were to be recognised as legally binding. While the personal law of Hindus and Muslims in regard to transfers on death had to be preserved, it was necessary that, as far as possible, the rules relating to transfers between living persons should be in harmony with those applicable to devolution on death.

The Indian Succession Act of 1865 was drafted by the Third Indian Law Commission. Saving the personal law of Hindus and Muslims, it applied prima facie to all persons domiciled in India, and to all immovable property in India. Its provisions are a simplification of those rules of English law which approximate to those generally accepted in Europe. It rejected the rule that marriage conferred rights on a husband to his wife's property, or on a widow in her deceased husband's realty. The distinction between real and personal property was ignored; all property descends on intestacy according to the same scheme, which, in most respects, followed the English rules for the distribution of personalty at the time.

The formalities giving validity to a will are more easily complied with than those prescribed by the English Wills Act, 1837, and they created a precedent followed in later statutes prescribing the form of documents disposing of interests in land between living persons. The testator must sign or mark; there must be at least two attesting witnesses, but it is not necessary that they should be present together.

nor that the testator should sign in the presence of *any of them*; an acknowledgment by the testator is sufficient.

In contrast with the rules of Hindu and Muhammadan law, the *property of a deceased person does not pass immediately* by the will or on intestacy; a grant of probate or letters of administration is necessary before the estate can be administered, but probate expires with the death of the grantee. The executor or administrator is first obliged to pay funeral and testamentary expenses and certain wages in full, and then all other debts rateably, if the assets are insufficient for payment in full.

The Act made rules controlling the common desire of testators to retain control over the destiny of their property after death. The perpetuity rule enables a testator to control the destination of a bequest during the lives of persons living at his death and subsequently during the *minority*[1] *of a person living at their deaths* to whom the property is to pass absolutely. A bequest to an unborn person, following a bequest of the same thing to a living person for his life, is only valid if the unborn person is to take absolutely. A direction to accumulate the income on property was only valid for a year after the testator's death, but an amending Act of 1929 substitutes a period of eighteen years, and excepts from the rule accumulations for payment of debts, or for providing portions of *descendants, or for preserving property*. The *rule* in its present form and the two rules previously referred to are now applicable to Hindu wills.

The rules relating to conditional bequests did not preserve the delicate distinctions drawn in England between forms of words which effect valid dispositions and those that do not. A bequest upon an impossible, illegal, or immoral condition is void; otherwise the rules endeavour to ensure that effect shall be given to the testator's wishes. If a condition that it shall be forfeited in prescribed circumstances is attached to a bequest, the testator's wishes will be implemented, notwithstanding that he has failed to say who, in the circumstances, is to have it. If an estate is left to X, but with the proviso that the bequest shall cease to have effect if he cuts down a wood or enters the army, X will forfeit his interest in the estate if he does either of these things.

A bequest to charity by a testator with a nephew or niece or nearer relative living is only valid if contained in a will made one year before death and deposited with a registrar. The perpetuity rule and the rule against accumulations do not apply to charitable bequests.

[1] Minority in India ordinarily ceases at eighteen.

A legacy to a debtor is not presumed to be in satisfaction of the debt; a father who makes a gift to a child is not presumed to have adeemed a legacy in a will made earlier.

The Act incorporates the doctrine of election[2] and contains a number of rules for the interpretation of wills; their emphasis is on ascertaining the intentions of the testator, and the avoidance of technicalities.

Rules governing intestate succession of Parsis were laid down by another Act of 1865. The process of making Hindu wills subject to the rules contained in the Indian Succession Act began with the Hindu Wills Act of 1870. The Probate and Administration Act of 1881 made it possible for any Indian, irrespective of his personal law, to secure a conclusive and comprehensive title as representative of a deceased person, but it was unnecessary for a Hindu or Muslim to take this course unless administration of the estate involved legal proceedings. To enable the representative of a deceased person to collect debts, the Succession Certificate Act of 1889 provided a simpler and less expensive alternative.

All this legislation was consolidated in the Indian Succession Act of 1925, which has been amended by fifteen subsequent Acts. Most of the original provisions of the Act of 1865 governing testate succession, including the necessary formalities, and the rules applicable to the interpretation of wills, and the rules governing legacies, now govern Hindu wills.

Transfer of Property

The first draft of the Transfer of Property Act was also prepared by the Third Indian Law Commission, but it aroused well-founded criticism in India. The supervening Act of 1882, which is mainly the work of Whitley Stokes,[3] applied to transfers between living persons many of the rules in the Indian Succession Act, such as the perpetuity rule, the rule against accumulations, the rule affecting transfers to unborn persons, the rules as to conditions, and the doctrine of election. On Maine's[4] instigation, provision was made for public registration of most transfers of immovable property.

The Act lays down general principles, but it is not a complete Code, and it saves many local usages. Any person competent to

[2] A testator, A, bequeaths to B an estate worth Rs. 800, which is actually the property of C, and leaves Rs. 1,000 to C. C must elect either to relinquish his estate and take the legacy, or to keep the estate, in which case he forfeits the legacy, and B gets Rs. 800, the remaining Rs. 200 going to the residuary legatee, if any, or devolving on intestacy. It is immaterial whether A knew or did not know that the estate belonged to C.

[3] Law Member, 1877–1882.

[4] Law Member, 1866–1872.

contract may transfer property. All property may be transferred, with stated exceptions which include a mere right to sue, but the English prohibition of maintenance and champerty[5] is not reproduced in Indian law; bargains between a litigant and a third party are valid if fair. There are no equitable estates in Indian law.

Dealing with transfers of immovables, it lays down rules governing cases of frequent occurrence in India. A transferee from a person legally entitled in certain circumstances to dispose of property (such as a Hindu widow or the manager of the joint family, who may sell or mortgage for legal necessity or the benefit of the estate) is protected if he has acted bona fide, made reasonable inquiries and satisfied himself that circumstances justifying the transfer exist. A person with a right to receive maintenance or marriage expenses out of the profits of immovable property (such as a member of a joint Hindu family out of the joint family estate) may enforce that right against a donee, or against a transferee for value with notice of the claim. A covenant restricting the use of land, and a contract annexed to the ownership of immovable property, such as a contract of sale, may be enforced against a transferee with notice. A transferee who takes from a person who, with the consent of other persons interested, is the ostensible owner of property, is protected if he acts in good faith and makes proper inquiries. A transferee of a share or undivided interest acquires his transferor's right to possession, enjoyment and partition. If property is bought out of a fund belonging to two or more persons, they acquire interests proportional to their interests in the fund. A transfer of property which is the subject of litigation cannot defeat any right created by the supervening judgment. A transfer to defeat or delay creditors, and a gratuitous transfer to defraud a subsequent transferee can be set aside at the instance of any person defeated, delayed or defrauded. In the original Act these rules were not to prevail over the rules of Hindu and Muhammadan law, but an amending Act of 1929 has made these rules applicable to transfers by Hindus.

The Act deals with sales, mortgages, and leases, except leases for agricultural purposes. A lease may be in perpetuity. A sale of immovable property worth Rs. 100, a sale of any incorporeal right in immovables, such as a rentcharge, a mortgage to secure Rs. 100, other than a mortgage by deposit of title deeds, and a lease for a term exceeding a year can only be effected by a registered instrument.

The Indian law of Registration is now contained in the Registration Act of 1908. There is no State guarantee of titles; the Act

[5] Champerty is an agreement between a party to legal proceedings and a third party to share the proceeds of litigation; maintenance is financing legal proceedings; both are criminal offences in England.

provides for the registration of documents which are compulsorily registrable, and for certain others. A document other than a will must be presented for registration within four months of execution; a document other than a will which affects immovable property must be presented to a sub-registrar having territorial jurisdiction over the area in which the property or part of it is situated; it must be presented by the executant, or a person claiming under it, or by an assignee or agent. The executant must be examined, and the sub-registrar must satisfy himself that the persons appearing before him are entitled to do so, that they are the persons they profess to be, and that the document was executed by the persons who purport to have done so. The sub-registrar must also inquire whether the consideration for the transfer has been paid, and make indorsements regarding these points on the document.

The document is copied into the appropriate register; if it affects property in other jurisdictions, memoranda are sent to the sub-registrars concerned. Apart from registration being essential to the validity of transfers of the kind mentioned above, a prospective transferee of immovable property must search the records of the sub-registrar within whose jurisdiction the property lies, for he is deemed to have notice of every transaction affecting immovable property which is compulsorily registrable and has been registered.

As the refusal of legal recognition to unregistered transfers was new in India, it created cases of hardship, and the courts assumed an equitable jurisdiction to relieve persons who suffered hardship from the strict application of the statute, by applying the doctrine of part performance. In England, under the Statute of Frauds, no action may be brought on a contract disposing of an interest in land unless there is a memorandum in writing signed by the other party, but the Court of Chancery managed to give relief to a party unable to bring an action at law by directing specific performance of a verbal contract, if something had been done which pointed unequivocally to the existence of such a contract. In India, if this remedy is not time-barred, a transferee in a similar difficulty can obtain specific performance under the Specific Relief Act, 1877, but the Indian courts went further, and, in effect, said that part performance could create interests which the Transfer of Property Act, 1882, said could only be created by registered instruments. Once this process began, it would have been impossible to set limits to it, and eventually the Privy Council pronounced against it.[9] The Indian Legislature then stepped in, and by an amending Act of 1929 gave statutory effect to the doctrine, while setting limits to it. If the transferor has signed

[9] *Ariff* v. *Jadunath* (1931) L.R. 58 I.A. 91.

a document from which the terms of the contract are ascertainable with reasonable certainty, if the transferee is in possession and is willing to complete, neither the transferor, nor any person claiming under him, can enforce against the transferee any right not created by the contract.

The Transfer of Property Act recognises six types of mortgage. In a "simple" mortgage, the mortgagor is personally bound to repay the mortgage money, or in default suffer the property to be sold under a decree of court. In a "mortgage by conditional sale," there is an ostensible sale of the property with a condition contained in the document that, if the money is repaid by a stated date, the sale is void; the mortgagee's remedy is a suit for foreclosure. In a "usufructuary" mortgage the mortgagor delivers or contracts to deliver the property, and authorises the mortgagee to collect the profits and appropriate them towards the debt; the mortgagor may recover the property when the debt has been discharged and the period, if any, set to the mortgage has expired. In an "English mortgage," the mortgagor binds himself to repay the money on a certain date, and transfers the property with a proviso for retransfer if repayment is made; it differs from a mortgage by conditional sale in that the mortgagor parts with his title on executing the document, and the mortgagee has the right to immediate possession; mortgages of this type are very rare, but in certain cases the power of sale may be exercised without the intervention of a court. A mortgage by deposit of title deeds is possible in Calcutta, Madras, Bombay and certain other towns, where commercial activities demand a power of raising money rapidly; generally the same incidents attach to it as to a simple mortgage. Any other transfer of immovable property to secure a loan or debt is an "anomalous mortgage" and its terms, as interpreted by the court, determine its incidents.

The Act demands a registered instrument to effect an exchange of land worth Rs. 100, but equality in kind or quantity of the estates exchanged is not necessary. A party deprived of the thing exchanged through defect of title and any person claiming under him is entitled, at his option, to compensation or the return of the thing exchanged.

The chapter dealing with gifts does not apply to gifts in expectation of death, which are dealt with in the Indian Succession Act or by the personal law and it does not apply to gifts between living Muslims. Though it was inserted at the instance of a Hindu critic of the draft Bill, the greater part of it did not apply to Hindus until 1929. A gift of immovable property requires a registered instrument; a gift of movables may be effected by delivery; in either case acceptance is essential. A gift of future property is void. A gift is only

revocable on a condition independent of the will of the donor. If to one of the things given is attached an obligation, the donee must repudiate or take all and perform the obligation. A donee of the whole of a donor's property is liable to the extent of the gift for the donor's existing debts—a necessary provision in a community where not only is prayer the proper duty of old age, but entering a religious order is a fitting conclusion to sublunary existence.

The last chapter deals with actionable claims, now defined as unsecured debts or beneficial interests in movables in respect of which a court will grant relief. A transfer requires a written instrument signed by the transferor and express written notice to the debtor signed by the transferor, or, if he refuses, the transferee. The transferee takes subject to the transferor's liabilities at the date of the transfer. Transfers of negotiable instruments, share certificates, and documents of title to goods are not governed by the provisions of the Act but by the provisions of the Negotiable Instruments Act, 1881, the Companies Act, 1956, and the Sale of Goods Act, 1930.

Easements

As has been seen, the Code of Criminal Procedure, 1898, provides for the settlement of disputes over easements, if they endanger the public peace and, in practice, most disputes of this kind in rural India are settled in this way but a magistrate's order does not preclude the parties from taking the dispute to a civil court.

The Indian Easements Act of 1882 is mainly the work of Whitley Stokes, and is based on English law. An easement, as defined by the Act, must be annexed to the ownership or occupation of the dominant heritage for its beneficial enjoyment but the servient heritage need not be near the dominant heritage. An easement must be a restriction on the right to enjoy the servient heritage or its natural advantages but it may be a mere amenity and it includes a *profit à prendre* at English law, such as a right to take fish from another's tank. The rights to free passage of air and of privacy of a *zenana* are recognised easements in India.

Whereas the dominant owner may not abate a wrongful obstruction of his easement, the servient owner, on his own land, may obstruct excessive user of an easement.

No written instrument is necessary for the grant of an easement. Twenty years' user or thirty against government, ending two years before suit, is sufficient to support a claim by prescription. The Act also provides for the acquisition of easements by custom, and the courts have laid down that, to support a claim, the custom must be reasonable, certain as to extent and application and supported by

such reliable evidence of acts openly done and assented to as to lead to the conclusion that it is local law; the custom need not have existed from time immemorial, but sufficiently long to suggest that originally it became local law by agreement or acquiescence.

The Easements Act also deals with remedies for disturbances of easements, their extinction and devolution. It saves the right of government to regulate the distribution of water flowing in natural channels, and in public irrigation works, and water retained in natural lakes; it also saves government rights in forests.

The Act also deals with licences, *i.e.*, grants to do on the grantor's immovable property something which would otherwise be unlawful, but not amounting to an easement or an interest in the property, such as a right to erect a temporary shed on another's land. A licence is not transferable, unless it is a licence to attend a place of public entertainment and even then an intention that it should not be transferable may be implied.

The Limitation Act, 1963, which deals with prescription as well as limitation of actions, and provides for the extinction of property rights at the conclusion of the period of limitation for a suit for their enforcement, gives a wider meaning to the word "easement" than the definition in the Easements Act would allow, for it includes rights, not annexed to the ownership or occupation of land, provided they do not arise from contract, to remove and appropriate things on another's land. The Act provides for the acquisition of such rights by prescription in the same way as the Easements Act.

Customary rights, such as the right of a particular community to bury its dead on a piece of land belonging to another, may be established by custom, as explained above.

Compulsory Acquisition of Property

The Land Acquisition Act of 1894, to which there are many State amendments, provides for the compulsory acquisition of land for public purposes by government, by companies, and also by industrial concerns with a hundred or more employees, if the land is required for the erection of workmen's cottages, or for constructing a work in the opinion of the State Government likely to prove useful to the public. Some Acts specifically state that acquisitions by specified bodies are acquisitions for public purposes.

After a preliminary notification by the State Government, it is lawful to enter on and survey the land. Objections to the proposal are heard by the Collector; his report is considered by government, whose declaration that the land is needed for a public purpose is final when published. Unless the acquisition is being made for

government, a contract is then made between the company or industrial concern and government for the payment of the costs of the acquisition by the company or industrial concern, the transfer to it of the land after acquisition, and the terms on which it is to be held. The Collector is then directed to proceed with the acquisition.

The Collector publishes notices, makes inquiries as to persons interested and calls for claims to compensation. After inquiry, he makes an award stating the area of the land, the amount of compensation and its apportionment. On publication of the award, the land vests in Government, and the Collector may take possession. Any person dissatisfied with the award may require the Collector to refer the matter to the district court, which will hear the persons dissatisfied and the Collector.

Compensation is assessed on the market value of the land at the date of publication of the preliminary notification, together with compensation for standing crops and trees at the time of taking possession, for injury caused by severance from a dispossessed owner's other land and for injury caused to his other property or his earnings but no allowance is made for the urgency of the acquisition; no solatium is given for his reluctance to part with his property nor can he benefit from the enhanced value of the land due to the acquisition.

On making his award, the Collector tenders payment to those he has held entitled to compensation, except when there is nobody competent to give a valid discharge or where there is a dispute as to title or the amount of compensation; in the excepted cases he deposits the money in court.

Agricultural Tenures

The law relating to agricultural tenures and interests in agricultural land is not the same in different parts of India. It was not necessarily identical throughout a Province, and it was not static, but the State legislation enacted since independence has created a greater measure of uniformity than that existing at the end of the British period.

In Bengal the permanent settlement necessarily involved recognition of a heritable and transferable right in the *zamindar*. Where *ryotwari* settlements were made, similar rights were recognised as vested in the occupants with whom the original settlements were made. But a variety of interests in agricultural land have been recognised, their nature sometimes being uncertain.

In Bengal, after the permanent settlement, if an occupant disposed of his rights with the consent or acquiescence of his landlord, the

transfer was not questioned. If the landlord objected, he probably brought the matter before a court; the courts at first doubted whether an occupancy right was heritable, and assumed the landlord's consent necessary to a transfer to another living person. Gradually the courts recognised the heritable nature of an occupancy right and, where it was customary, the right to transfer it to a living person without the landlord's consent. Occupancy rights received *statutory* recognition in 1859; an Act of 1869 impliedly recognised that they were heritable, and the Bengal Tenancy Act, 1885, permitted a transfer to a living person in accordance with usage. To prove a custom, its antiquity, uniformity, and notoriety must be established by clear evidence, but to prove usage, which *may be in the course* of growth, it is enough to show that it is sufficiently well known and acquiesced in for it to be presumed to be an implied term of a contract between landlord and tenant.[7] The courts and the Legislature combined to confer the attribute of transferability on rights *to which it did not attach at the time when* the British first assumed political responsibility in Bengal, but recent amendments of the Act of 1885 indicate a tendency to restrict the right to transfer an occupancy right, particularly with regard to aborigines.

The Bengal Tenancy Act of 1885 defined persons holding under others for the purpose of collecting rents as tenure holders, and actual cultivators as *ryots*. It specifically recognised that a permanent tenure-holder and a *ryot* at a fixed rate of rent had a *transferable* and *heritable* right. An occupancy right, acquired by twelve years' occupation, is heritable and an amending Act of 1928 made it freely transferable. Baser tenures in land were governed by contract, subject to limitations imposed by the Act. Even fixed rents are subject to variation in circumstances laid down in the Act, which provided for making records of rights, and settlement of fair rents by revenue officers. Though liable to eviction for breaches of other conditions, permanent tenure-holders, *ryots* at *fixed rates and ryots with occupancy rights were liable to* suffer sale of their interests in execution of decrees for rent; holders of baser tenures were simply liable to eviction but only under a decree. The Act provided for compensation for improvements.

Though the early legislation for Bengal generally applied in Northern India, later legislation created diversity. The Agra Tenancy Act of 1901 retained the twelve-year rule for occupancy rights and recognised the heritability and transferability of the *interests of the permanent tenure-holder and the fixed rate* tenant but it recognised a new tenure in the ex-proprietary tenant, who,

[7] See *Palakdhari v. Manners* (1895) I.L.R. 23 Cal. 179.

like the occupancy tenant and the non-occupancy tenant, had an interest not normally liable to attachment, devolving on death according to rules only slightly different from those of Hindu law, and transferable *inter vivos* only within strict limits. The Act of 1926 which superseded it repealed the twelve-year rule.

In the Punjab, at the time when tenures were being defined, most landowners were actual cultivators, which may explain the rejection of the rule that an occupancy right could be created by holding land for a specified period. The Punjab Tenancy Act of 1887 only recognised occupancy rights existing at the commencement of the Act. An occupancy right was heritable according to rules similar to those in the Agra Act, and it could be transferred in the lifetime of the holder, but the landlord had a right of pre-emption.

But it is impossible, in a book of this nature, to pursue further the different kinds of tenures recognised in different States. Independence was quickly followed by legislation aimed at breaking up the large agricultural estates, fixing a ceiling of fifty acres or thereabouts for agricultural holdings and removing, as far as possible, the intervention of any person or interest between the State and the occupying cultivator. The Bombay Tenancy and Agricultural Lands Act, 1948, is an instance of such legislation. This regards tenancies as for a term of ten years, normally deemed to be renewed, though the landlord may terminate by giving a year's notice, if he requires the land for himself; his ability to take advantage of this is restricted by the fact that he cannot personally cultivate more than fifty acres. A tenant is also liable to eviction for doing permanent injury to the land or using it for a non-agricultural purpose or for sub-letting or subdividing, except when, on the death of a Hindu tenant, it is divided between his agnate male descendants as heirs. The maximum rent is fixed at one-fourth of the value of the produce in the case of wet land and one-third in any other case. Rent-in-kind and service as part of the rent are to be commuted. A tribunal can be invoked for settlement of a reasonable rent. A protected tenant, *i.e.*, a tenant who had held continuously for six years preceding January 1, 1938 or 1945, has a right to purchase his holding at a price fixed by a tribunal in default of agreement; he is also entitled to compensation for improvements. If government is satisfied that, on account of a landlord's neglect or disputes between him and his tenants, cultivation has been seriously affected or if it deems it necessary to do so to ensure full and efficient use of agricultural land, it may issue a notification, whereupon the landlord's estate vests in government, and a manager is appointed; he deals with the estate in a manner similar to that in which a court of wards deals with an estate

of which it has assumed control. The State may also assume the management of any land left uncultivated for two years. The State may acquire any land of which it has assumed management; in such a case the Collector or other officer appointed by government holds an inquiry to determine the compensation and its distribution. The Act also prohibits the transfer of agricultural land to non-agriculturists.

There are other Bombay statutes abolishing various kinds of rights in land which usually originated in a grant from some predecessor government. For instance the Kauli and Kahuban Tenures (Abolition) Act, 1953, cancelled all *kauli* and *kahuban* leases and made the occupants liable to pay land revenue to government. All waste lands reverted to government and the Collector was to determine the compensation payable to the expropriated landlords, applying the principles of the Land Acquisition Act, 1894, but being restricted to a maximum of Rs. 25 per 100 acres. The Bombay Maliki Tenure Abolition Act, 1949, restricted the compensation to three times the average amount received by the landlord in the past five years.

Another instance of the post-independence legislation is the Madras Estates (Abolition and Conversion into *Ryotwari*) Act, 1948, which expropriates *zamindari* rights and vests them in the State Government. It preserves to every *zamindar* a *ryotwari* interest in land which he actually cultivates by his servants or with hired labour, and compensates him for the expropriated *zamindari* rights. Compensation is a multiple of the "basic annual sum"; the multiple is thirty when the basic annual sum does not exceed Rs. 1,000, but decreases, as the basic annual sum increases, to twelve and a half when the basic annual sum reaches a lakh of rupees. The basic annual sum is notionally the net annual profit on the estate, but it is calculated according to a prescribed formula, some of the data being apparent in the records of revenue demands, and others necessitating inquiry. The compensation is assessed by revenue officials, who are obliged to communicate their data to persons interested; there is a right of appeal to the Board of Revenue. The distribution of compensation is made by special tribunals, each composed of two judicial officers and a revenue officer.

Acts Dealing with Agricultural Indebtedness

During the nineteenth century, the law recognised transferable rights in land, and freedom of contract. The processes of the courts were new in India; at a sale of a heritable and transferable interest in land by a revenue officer to recover an arrear of land revenue or

other due the purchaser got a clear title free of any pre-existing encumbrance or charge. All these factors combined to give the moneylender an advantage over his debtor. Before the British period a creditor had little, if any, hope of enforcing a claim against an agricultural debtor by seizure of his land. Interest is forbidden by the *Sharia*, and, among Hindus, the rule of *damdupat* prohibited the recovery of interest in excess of the principal. A common method of recovering a debt among Hindus was by sitting *dharma*, *i.e.*, fasting or inducing a brahmin to fast in the vicinity of the debtor till he paid in order to avoid the spiritual consequences of responsibility for the sitter's death. This practice infuriated the Saxon administrator just as a similar practice had earlier done in Ireland; in both countries he made it a criminal offence.

The courts, which only applied the rule of *damdupat* in the Bombay Presidency, in the town of Calcutta and in Berar, so interpreted the rule that it only applied to the amount of interest recoverable at any one time and so that it did not prevent the capitalisation of interest. During the British period the problem of agricultural indebtedness assumed increasing importance. The agriculturist has to be financed at the beginning of the agricultural season, and his own conduct in his dealings with the moneylender is not always impeccable. The solution must give the moneylender a fair return for his services.

The Usurious Loans Act of 1918, not in force in areas previously forming Part B States, empowers a court to reopen transactions and relieve a debtor of excessive interest but it cannot reopen an agreement closing previous dealings entered into more than twelve years after the original transaction.

The Bengal Moneylenders Act of 1940 obliges all moneylenders to be registered. Registration may be cancelled on conviction for specified crimes or on the declaration of a court that the person concerned is unfit for registration. Any borrower may move a court for cancellation. A court will give no relief to an unregistered moneylender. A moneylender must keep a cashbook, ledger and receipt forms, deliver to every borrower a statement of conditions of the loan, give a plain and complete receipt for every payment made and, when payment has been made in full, indelibly cancel every document or entry signed by the borrower and return every security. He must present every borrower annually with a full statement of account and the debtor's silence is not an admission of its accuracy. In every suit on a loan, the court must decide whether these provisions have been complied with, disallowing interest if they have not. No borrower is liable to pay more than twice the original principal

or interest in excess of the outstanding principal; interest on unsecured loans cannot exceed 10 per cent. per annum; on secured loans it may not exceed 8 per cent. The courts have power to reopen transactions between creditor and debtor.

The Assam Debt Conciliation Act, 1936, is another attempt to deal with the problem of agricultural indebtedness. Debt conciliation boards of from three to seven members are empowered to deal with creditors' or debtors' petitions, if the debtor is an agriculturist and the debt does not exceed five thousand rupees. The debtor must file an application with a statement of debts, assets and income and a history of his debts. The board endeavours to bring about a settlement and, if creditors representing 40 per cent. of the total debts agree, the settlement is reduced to writing and registered. A creditor who does not agree to the settlement cannot execute any decree until the rights of the creditors who are parties to the settlement have been satisfied. If a creditor has refused what the board certifies as a fair offer, the court before whom he sues may make a decree in terms of the offer and disallow costs. The settlement is executed, if the debtor defaults, not by a court, but by the revenue authorities. Though the members of the board are appointed by government and may be removed, the main defect in this Act is that the board's decisions are subject to no control by any appellate or revisional authority. The principles of this Act are also embodied in the Bengal Agricultural Debtors' Act, 1935, but it operates only on *ryots* or persons who cultivate with hired labour. The Act is more elaborate than the Assam Act; it creates an appellate authority, and provides simple insolvency proceedings to be operated by the board, if the board is satisfied that the debts, with reasonable deductions, amount to more than the debtor can pay in twenty years.

In addition to the policy of restricting the power of the money-lender to enforce contracts against his debtors, the policy of providing other sources from which the agriculturist can seek financial assistance has been pursued. The Land Improvements Loans Act of 1883, which is not in force in areas previously forming Part B States, provided for the grant of loans by government for such improvements as wells, tanks, drainage, reclamation and protection from floods and erosion and made some concessions in the incidence of land revenue, which would otherwise have been enhanced by the improvements. The loans were repayable by instalments over a period not exceeding thirty-five years, but were recoverable as arrears of land revenue. The Agriculturists Loans Act, 1884, in force in Assam, Andhra Pradesh, Delhi, Gujarat, Madhya Pradesh, Maharashtra, Punjab and U.P., provided for the grant of loans for the

relief of distress, the purchase of seed and cattle, and other agricultural purposes not specified in the Act of 1883. The rates of interest on loans under these Acts were low compared with those demanded by the moneylender or the landlord but the amount of money available for distribution was necessarily limited; the subordinate officials responsible for the administration of the Acts did not always perform their duties satisfactorily and the borrowers sometimes endeavoured to take foolish advantage of them.

Another policy, calculated, if successful, to improve the position of the agriculturist and to encourage his self-reliance and his responsibility to his neighbour, while keeping government control in the background, was followed in the enactment of the Co-operative Societies Act of 1912, not in force in areas previously forming Part B States. This was not the only object of this Act, under which co-operative stores and other societies of the kind familiar in urban England have been registered, but the main kind of rural society contemplated by the Act to make loans to its members, or supply them with seed, manure, cattle and agricultural machinery, must be restricted in membership to a village or group of villages. It must have at least ten members and its liability is unlimited. The Act also contemplates societies, with limited liability, of which societies of the rural type may be members, which finance the rural societies. A member of a society may not exercise any privilege until he has paid the dues prescribed by the society's rules, which must be approved before the society is registered. On registration it becomes a body corporate and enjoys many privileges not available to a private person. It is not obliged to register instruments relating to its shares and debentures; it may be exempted from income tax or stamp duty. After his debts to the State and his rent due to his landlord, a member's debts to the society take priority over his other debts and the society has a charge upon his share, deposits and interest and a lien upon things supplied or things bought with money lent to him. The liability of an ex-member or a deceased member's estate is limited to the society's debts as they stood when he ceased to be a member. A creditor may ask for an inspection by an official of the Co-operative Department, which may result in the society's registration being cancelled. Cancellation may also follow upon a request from members of the society. A Co-operative Department official acts as liquidator, and has full power to wind up the affairs of a society, his orders being enforceable by a court.

While the earlier British policy of upholding freedom of contract has, in agricultural India, had to give way to the pre-British principles of keeping the cultivator on his land, restricting interest on loans

and co-operative societies are new and the ideas on which they are based are not yet sufficiently understood to make them as successful as can be hoped. Abolition of *zamindari* rights has long been a plank in the Congress political platform.

Legislative capacity in the matters dealt with in this Chapter is distributed as follows: Intestacy, Succession, Wills, Transfer of Property other than Agricultural Land, and Registration are on the Concurrent List.[8] Rights in Land, Land Tenures, Transfer of Agricultural Land, Agricultural Loans, Moneylenders, Relief of Agricultural Indebtedness, and Co-operative Societies are on the State List.[9]

In the Constitution as originally enacted, the principles and manner of making compensation for the compulsory acquisition of property were on the Concurrent List; the actual acquisition of property was within the exclusive competence of the State Legislature, unless the property was required for Union purposes, in which case legislation regarding it could only be passed by Parliament. But the Constitution (Seventh Amendment) Act, 1957, has removed the items referred to from the Union and State Lists and substituted "Acquisition and requisitioning of Property" for the original item on the Concurrent List.[10]

[8] Sched. 7, List 3, items 5 and 6.
[9] Sched. 7, List 2, items 18, 30 and 32.
[10] Sched. 7, List 3, item 42.

CHAPTER 18

LAWS RELATING TO CONTRACT

The Indian Contract Act

Though the Supreme Courts in the Presidency Towns were obliged by statute to administer the personal law in matters of contract when the parties were Hindus or Muslims, it transpired in practice that the application of English principles raised no difficulty. On many points there were no differences between the English law and the personal law; on others there was no clear rule in the personal law. During the first three-quarters of the nineteenth century, many Indian men of business acquired experience from their relations with Britons; they did not confine their operations to their own co-religionists, and, had they been consulted, they would probably have been in favour of a uniform law of contract.

The first draft of the Indian Contract Act was the work of the Third Indian Law Commission. It was a simplified statement of English law with modifications deemed suitable to India but it had to wait six years, until 1872, for enactment; the disagreements between the views of the Indian Legislature and the Commission led to the resignation of the latter, and the transfer of the task of drafting future statutes to the Indian legislative department. Some of the Commissioners' proposals were rejected, including a provision that title to goods might be acquired by purchase in good faith from a person in possession in circumstances which did not suggest that he had no right to them. The portion of the draft dealing with specific performance was removed and became the basis of a different Act dealing mainly with this subject. Some provisions were borrowed from the draft New York code of 1862, but these cannot be said to have been embellishments. Finally Fitzjames Stephen[1] re-drafted the earlier sections dealing with fundamentals.

The Act as passed in 1872, dealt with contract generally, with quasi-contract,[2] sale of goods, indemnity and guarantee, bailment, agency and partnership, but the chapters on sale of goods and partnership have been repealed and replaced by special Acts dealing with these subjects.

The Act does not adopt the English rules relating to contracts

[1] Law Member, 1869–1872.

[2] This deals with the rights of a person who has supplied goods or services to a person incapable of contracting or with whom he has not contracted.

under seal. A promise without consideration is not binding unless either it is in writing and registered and is made out of natural affection in favour of a near relative or is a signed undertaking in writing to pay a time-barred debt or is a promise to compensate one who has done voluntarily what the promisor was legally bound to do. The consideration for a binding promise must be something done, foreborne or promised, at the desire of the promisor, but not necessarily by the promisee, and it may have preceded the promise. The English doctrine that consideration must move from the promisee is not enacted, but the Act does not give a right of action to a person for whose benefit an agreement was made but who is not a party to it.

If consent to an agreement has been obtained by undue influence, coercion, fraud or misrepresentation, it is voidable at the instance of the victim. Coercion need not come from a party to the contract; it includes a threat of any act punishable under the Penal Code, and a threat to detain a person's property. The definition of "undue influence," originally narrower than that assigned to the expression in England, was extended by an amending Act in 1899 so as to cover cases in which one party has real or apparent authority over or stands in a position of trust towards the other, whose judgment is affected by age or bodily or mental deficiency and in which the former turns the situation to his advantage; it continued the protection previously given by the courts to *purdanashin* ladies. In all these cases the Evidence Act, 1872, obliges the dominant party to prove that he acted in good faith. The definition of "misrepresentation" adopted from the New York draft is not illuminating: it appears to include a representation, untrue in fact, but believed to be true on inadequate grounds, and the innocent causing of a mistake as to the substance of the thing agreed upon.

An agreement entered into by a party incompetent to contract, on account of minority or insanity, is void. An agreement is void if its object is forbidden by law or is designed to defeat a provision of law or if its object involves injury to another or is immoral or contrary to public policy. A recently enacted provision in the Motor Vehicles Act, 1939, makes void any agreement restricting liability for injury to a passenger in a public motor-vehicle. The Act adopts from the New York draft rules which make void an agreement in restraint of marriage of an adult and an agreement in restraint of trade, except an agreement by the vendor of the goodwill of a business not to carry on a similar business within reasonable limits, but these provisions have not been strictly construed by the courts.

Though wagers are void, agreements collateral to a wager are valid, except in Bombay, where they are struck by a local Act.

If one of two or more joint-promisors dies, the obligation to perform the promise does not, as in England, pass to the surviving joint-promisors but devolves on them jointly with the legal representatives of the dead promisor. A joint promise is enforceable against any individual promisor; a release of one joint-promisor does not discharge the others nor does it impair the rights of his co-promisors against him.

The rules governing frustration of a contract differ from those applied in England. Where performance becomes impossible or, through no fault of the promisor, unlawful, the contract is void and any advantage received under it must be restored but if the promisor could and the promisee could not foresee what has supervened, the promisor must compensate. An exporter who had paid freight to a shipowner was entitled to recover it when export of the goods was forbidden by government.

The English rule that, if one party has performed his part, the other party can only discharge his obligation by performing his part, is not applicable in India. A promisee has complete discretion to dispense with performance wholly or partially or to accept anything else in lieu of performance. If A owes B Rs. 100, B may accept Rs. 50 or anything else in full satisfaction.

In quasi-contract, the rules governing reimbursement when one person pays money which another was bound to pay because he is interested in payment being made and when one person, without intending to act gratuitously, does an act the benefit of which is enjoyed by another, cover a wider field of claims than would be recognised in English law.

For the English rule that a sum specified in a contract as payable in the event of its breach is to be construed as a penalty or liquidated damages according to the true intention of the parties, the Act substitutes the rule that in every case only reasonable compensation (assessed on the principles of English law), not exceeding the sum so specified, can be recovered.

The chapter on bailment imposes on the bailee of goods, in the absence of a special contract, the standard of care taken by the average man when dealing with similar goods belonging to him. This applies to innkeepers, and to railways, but not to common carriers, whose liabilities are governed by the English rules as modified by the Carriers Act of 1865.

The rights of the finder of goods, as set out in a provision borrowed from the New York draft, are, if the owner cannot be found,

or if he refuses to pay the finder's expenses, to sell the goods if they are perishable or if the finder's expenses amount to two-thirds of their value.

The Specific Relief Act

The Specific Relief Act of 1877 is mainly the work of Whitley Stokes. The rules governing specific performance of part of a contract when complete performance is impossible were part of the Commissioners' original draft of the Contract Act. The rules governing rectification and cancellation of written instruments, and rescission of contracts, are adapted from the New York draft code; the remaining provisions are principles derived from English reports and treatises, simplified and adapted, though the Scots action of declarator has influenced the provisions relating to declaratory decrees.

The Act deals mainly with what in England is called equitable relief. In India in the Presidency Supreme Courts only, so long as they existed, was there any possible distinction between law and equity; the remedies provided by the Act, like almost any other remedy which a court can grant, are statutory remedies, notwithstanding that some of the restrictions on the grant of such remedies originate in the division of jurisdiction between courts of law and courts of equity in England.

The most important chapter in the Act deals with specific performance of a contract. This may be decreed when there is a promise to execute a trust or where it is impossible to assess compensation for non-performance or when compensation would not give adequate relief or when compensation would probably not be recoverable but not when performance of the promise depends on personal qualifications[a] nor when the promise involves performance of continuous duties for more than three years. It is presumed that for a breach of a contract to transfer immovable property compensation would not be adequate relief; the presumption is otherwise in respect to other contracts.

If one party cannot do what he has promised in full but the outstanding portion is a small part of the whole, either party may ask for specific performance with compensation for the part unperformed but, when the outstanding portion is a considerable part of the whole, the party in default may be ordered to do what he can, if the other party waives all claim to compensation.

A claim for compensation may be made alternative to a claim

[a] As in the case of a contract to write a book or paint a portrait.

for specific performance or may be substituted for it but the dismissal of a suit for specific performance bars a suit for compensation.

Notwithstanding that a period of three years is prescribed by the Limitation Act for suits for specific performance, jurisdiction to grant this and most other remedies provided by the Act is discretionary, though the court's discretion must be exercised in accordance with rules laid down in the Act and in the case law. Delay in instituting proceedings may, although the suit is brought within the statutory period, result in the dismissal of the suit.

A perpetual injunction may be granted to protect a legal right or enforce a legal obligation, whether arising out of contract or not, subject to rules similar to those governing the right to claim specific performance. Disturbance of an easement, nuisance, and infringement of copyright may be prevented or abated by this process. An injunction may be partly mandatory and partly prohibitory; if a promise to do something implies a promise to refrain from doing something else, notwithstanding that specific performance of the affirmative promise cannot be granted, the court may yet restrain by injunction the act which the promisor impliedly undertook not to do. For instance, if a skilled person promised to serve someone for a year, implying that he would not serve anyone else in the same capacity during that period, the court could not decree specific performance because performance depends on his personal qualifications, but it might grant an injunction restraining the promisor from giving his services to the promisee's business rival.

The expression of a contract or disposition of property in a written instrument may be rectified, if, on account of fraud or of common mistake as to its form, it fails to express what was intended, provided, if it is a contract, that the court is satisfied that an enforceable agreement was reached and that the intended terms and its effect are ascertainable from other evidence.

A written instrument may be cancelled, not exclusively at the instance of a party to it; it could be done at the instance of any person against whom it is void or voidable. It would be necessary to show that its existence causes the person suing for its cancellation reasonable apprehension of serious injury.

A written contract may be rescinded if it is voidable by the plaintiff or if, for reasons not evident on the face of it, it is illegal and the defendant is the more blameworthy or if the defendant defaults in making payments directed under a decree for specific performance of a contract of sale or to lease.

The Act substituted for the writ of mandamus a procedure whereby the High Courts in the Presidency Towns can issue orders

to public servants and others within their original civil jurisdiction to do what they are legally bound to do or abstain from doing acts in clear contravention of law, provided that such an order is necessary *to protect the applicant's property, privilege or other* personal right and that there is no other effective remedy available.

It also gave a person dispossessed of immovable property otherwise than by the normal process of law (*e.g.*, a tenant holding over who has been forcibly evicted by his landlord) a right to recover possession by suit filed within six months, irrespective of the dispossessor's superior title. This remedy is available notwithstanding that the evictor has been declared entitled to possession by a criminal court. The decree is not subject to appeal but it is no bar to a suit for possession based on title.

A declaratory decree may be granted as to a person's legal character or right to property against any person interested to deny it but not if there has been a failure to ask for further relief which could have been granted. It is not necessary that the right should be capable of immediate enjoyment but, if it is a *future right*, it must not depend upon some uncertain event. A declaration of immediate right to possession in favour of a person out of possession would not be granted unless to the prayer for the declaration there were added a prayer for possession.

The Indian Trusts Act

Though the English law of trusts, in so far as it creates equitable estates, is inapplicable in India, the conception of a trust as an obligation annexed to the ownership of property for the benefit of another was well known in Hindu law and in the *Sharia*. Before and during the British period, it was common for a person of power and influence to hold property *benami*, *i.e.*, for the benefit of another, whose position and rights the courts during the British period recognised and protected.

The Indian Trusts Act, mainly the work of Whitley Stokes, was enacted in 1882. It does not apply to *wakfs*[4] nor to religious and charitable endowments. Though now in force in most parts of India, the statute, when enacted, was given a limited territorial application, with provision for its extension to other parts of India by notification. Like other statutes of limited territorial application, its principles were enforced, in the absence of a relevant statutory provision in those parts of India where it was not in force, as rules of "justice, equity and good conscience."

[4] A *wakf* is the permanent dedication by a Muslim of property for charity or religious purposes, but it may be used to make a family settlement in perpetuity.

The Act defines a trust as an obligation annexed to the ownership of property arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another or another and the owner. The beneficiary has no estate in the subject-matter of the trust; his interest is the sum of his rights against the trustee. What the Act calls a trust is an express trust in English law. What in England are called constructive or implied trusts are described in the Act as "obligations in the nature of trusts"; generally, when such an obligation attaches to the ownership of property, the owner holds subject to the same duties and disabilities as a trustee. If property is transferred to B but A pays for it and the circumstances do not indicate that A intended to benefit B, B is liable to A as a trustee. If C obtains property from D by undue influence, C is liable to D as a trustee.

A trust may be created for any purpose which would be lawful if it were the object of a contract. A trust of immovable property can only be created by will or by registered instrument; a trust of movable property may be made by delivery to the trustee. The intention to create the trust, its purposes, the beneficiary and the trust property must be indicated with reasonable certainty.

Any person competent to contract may create a trust; a minor may create a trust with the permission of the court. Any person capable of holding property may be a beneficiary, or, with the following exceptions, a trustee. If the trust involves the exercise of discretion, the trustee must be competent to contract. A sole trustee cannot compromise a claim relating to a trust. A trustee may be removed for prolonged absence from India or if, in the opinion of the court, he is unfit to act.

The duties, liabilities, rights and powers of a trustee are similar to those of general application to trustees in England. A trustee must execute the trust, protect the title to the trust property, take as much care of it as the average man would take of his own, convert property of a wasting nature, such as leasehold and future interests; he must be impartial, prevent waste and keep accounts. If the trust property is money, he must invest it in securities prescribed by the Act. He must make good losses due to breach of trust. He is entitled to his expenses; he has a right of indemnity against a gainer by a breach of trust; he may apply to the court for advice. He may do all things necessary for the benefit of the trust property and the support of a beneficiary incompetent to contract but he may not grant a lease for a period exceeding twenty-one years without the permission of the court. He may change investments but not without the consent of a beneficiary competent to contract, who has a *life*

interest or an interest exceeding that. If the beneficiary is a minor, he may apply the income at his discretion to the maintenance of the beneficiary, investing the surplus in trustee securities, with liberty to appropriate it to the minor's maintenance later; he may not apply the corpus of the trust property to the maintenance of a minor beneficiary without leave of the court. Neither a trustee nor an ex-trustee may accept a transfer of trust property without the leave of the court.

Except when a beneficiary is a married woman and the trust instrument restrains alienation of her beneficial interest, a beneficiary who is competent to contract can require the trustee to deliver the trust property to him or transfer his interest to another. If the trustee mingles trust property with his own, the beneficiary has a charge upon the whole fund for the satisfaction of his interest.

The Sale of Goods Act and the Partnership Act

The chapter on Sale of Goods in the Contract Act was replaced by the Indian Sale of Goods Act, 1930. As trade developed in India after the enactment of the Contract Act, it transpired that the part of that Act dealing with this subject did not provide sufficient rules to cover the cases coming before the courts. Though the Third Indian Law Commission had deprecated the possibility, when the courts had resort to the residuary rule of "justice, equity and good conscience," they were usually disposed to follow English decisions. The (British) Sale of Goods Act, 1893, owed something to the chapter on the same subject in the Contract Act; it was but natural, therefore, that the Indian Act of 1930 should follow closely the British Act of 1893. The general arrangement of the subject-matter and the bulk of its content are the same in both Acts. The main difference between the provisions of the Contract Act and the Act of 1930 is the distinction drawn in the latter between a condition, breach of which vitiates a contract of sale, and a warranty, breach of which only gives a right to compensation. Unlike the British Act, the Indian Act applies to stocks and shares. There is a difference between the two Acts in the exceptions to the general rule that the buyer cannot get a better title than the seller. The English rule that a bona fide purchaser in market overt[4] acquires a good title does not apply in India, but, on the other hand, in India, the purchaser in good faith from one of several joint owners gets a good title. The English rule that, on

[4] In the City of London on weekdays, and in English market towns on market days, sales in shops of goods of the kind normally sold therein are sales in market overt; the purchaser acquires a good title, notwithstanding defects in the vendor's title. The rejected proposal of the Third Indian Law Commission would have made the whole of India market overt.

prosecution of the thief to conviction, the stolen property, notwithstanding intermediate dealings, revests in the owner and the rule that an attachment of goods by civil process in the hands of a judgment debtor is binding on the goods, are not reproduced in the Indian Act.

The chapter in the Contract Act on Partnership influenced the draftsmen of the (British) Partnership Act of 1890, which in turn influenced the draftsmen of the Indian Partnership Act of 1932, but the correspondence between the English and Indian Acts on this subject is less close than that between the Sale of Goods Acts. There is no important difference in principle between the two Acts, but it is said that the Indian Act puts more emphasis on the "firm" as a body of persons, whereas the British Act hesitates to use this word as tending to imply a corporate personality recognised at Scots law but denied by the common law. The word "firm" instead of the word "partnership" to describe the partners collectively was used in the Contract Act and it does not imply that the firm is a person in the eyes of Indian law. In India, as in England, the firm may sue and be sued, whether the opposite party is an outsider or a partner, but that in India is as yet a matter of procedure; it is of course possible that in consequence of this difference in nomenclature the Indian law may develop on lines different from that which English law will follow. Like many other Indian statutes, the Indian Partnership Act is not merely declaratory; it is in part educative. It laid stress on one point some of the Indian courts were in danger of ignoring; partnership is a matter of contract; it cannot arise from status, as in a joint Hindu family. It deals clearly with the incidents of a partnership at will, which is far commoner in India than in England. It is submitted that, for Indian purposes at least, the arrangement of the Indian Act is an improvement on the British Act; in particular the collation into two separate chapters of the rules governing ingoing and outgoing partners and the dissolution of the firm should evoke the gratitude of the Indian judge and lawyer. The Act contains provisions, inspired in part by the (British) Registration of Business Names Act of 1916, which a State Government may notify as not applicable to the State. In places to which this part of the Act applies, firms are required to register their names and places of business, the names and addresses of the partners and the duration of the firm, and also to keep the information in the register up to date. Failure to register makes it impossible for a firm or any partner to sue in contract; a partner cannot sue an unregistered firm, but no disability attaches to any other person with a right of suit against an unregistered firm.

For the greater part of the work done on the Indian Sale of Goods Act and the Indian Partnership Act, India is indebted to Sir Dinshah Mulla.

Indian Company Law

The development of Indian company law followed, with a lag, the development of the law in England. The Indian Companies Act of 1913 was a reproduction of the English Act of 1908; it avoided dealing with a question which was already assuming importance, the position of the managing agent of an Indian company. In England there are some companies, more especially among those in the City of London concerned in shipping and tea, which are managed by a general manager or secretary without directors, but their peculiar position had not called for special notice in the British Companies Acts. In India, however, men with business experience and with capital at their command, who formerly were almost exclusively Britons, found it profitable to become, as individuals or as a firm or as a company, managing agents of a number of companies: the obvious commercial advantages were economy in staff, ability to make large bulk purchases and the availability of adequate capital.

Originally, in India, few companies had directors. The managing agent floated the company and subscribed much of the capital. Though the Act of 1913 required directors for new companies, many of the older companies continued the managing agency system without directors. The Act of 1913 left the distribution of powers between the managing agent and the directors to be determined by the company's articles, and some such articles only left the directors with a power to give advice to the managing agent. Power to appoint and remove one or more directors and to nominate the chairman was usually reserved to the managing agent. In Calcutta it was usual for the managing agent to be appointed for a specified period and to continue until dismissed by a special resolution after long notice at a general meeting with a specified quorum; if the company was reconstituted, the managing agent was to continue to act for the reconstituted company.

The efficiency of the system would not tend to make it, in the eyes of certain Indians, any less a part of the general system of foreign domination and Indians generally regarded it as diverting from India an unfair share of the profits of Indian commerce and industry. When the incorporation of the provisions of the (British) Companies Act of 1929 in the Indian Act of 1936 was under consideration in the Central Indian Legislature, by this time a representative body, the future of the managing agency system could not be

shelved. While the Indian Companies Act of 1936 introduced into the Act of 1913 new provisions taken from the British Act of 1929, it had other provisions aimed at the managing agency system.

After the Cohen Committee had made its report, which was the basis of the English Act of 1948, the Indian Government turned its attention to a review of the Indian law. As, at present, four new companies are incorporated daily, the need for review became more pressing with the passage of time. Some amendments to the Act of 1913 were made in 1951. In 1952 a committee under the chairmanship of Mr. C. H. Bhabha made extensive inquiries and submitted a report on which the Companies Act of 1956 was based. This Act, which repeals the Act of 1913 and is a complete code, retains the basic concepts of English company law. On incorporation a company becomes a legal entity apart from its members and officers, with a field of activity, defined by its memorandum, which is its constitution or charter; it is bound to abide by its articles, which are its by-laws, though an outsider dealing with it may assume that its internal management is so done. Most of its powers are exercised by a board of directors, who are appointed by the members in general meeting. It must furnish annual accounts and may pay dividends only out of profits. If it becomes insolvent or cannot carry on business, it is liable to be wound up and its assets distributed, first among its creditors and then among its members. But the Act of 1956 devotes special attention to ensuring a minimum standard of good behaviour in the promotion and management of companies. It enforces a full and true disclosure of relevant matters in the prospectus and similar documents, the preparation of accounts which disclose all relevant facts and the method of working. It insures that all relevant material is made available to members at the company's meetings; it provides for investigation of the company's affairs, when misconduct is suspected or when a minority of members is subjected to oppression; it empowers public authorities not only to enforce compliance with the provisions of the Act but also to interfere with the management of a company when its business is not being conducted for the benefit of its members or in the public interest.

Under the Act of 1956 some powers previously delegated to the States have been resumed by the Centre, and a Department of Company Law Administration has been formed in the Ministry of Industry which exercises the powers of the Union Government under the Act. When applying for registration and for leave to commence business, a company must file with the registrar many important documents regarding itself; it must file annual accounts and register charges. The registrar may call for an explanation of anything in

any such document and move a magistrate to seize any book or paper relating to the affairs of the company. On a report of the registrar or on the application of members holding one-tenth of the capital, government may appoint an inspector to investigate the affairs of a company; the inspector's powers extend to investigating its holding and subsidiary companies and its managing agencies, to requiring the production of documents and the examination of officers and employees on oath. On the inspector's report, government may order prosecutions, cause an application for winding up to be filed and institute proceedings to recover damages for fraud or misfeasance or to recover misappropriated property. Notice of every application to a court for relief against oppression of a minority or mismanagement must be given to government and no order may be passed without hearing government's views. Government may itself apply to the court for these reliefs or it may nominate directors in place of two ordinary directors to hold office for three years; it may require the company to amend its articles so that directors are elected by proportional representation; it may also forbid changes in the personnel of a company's officers. Government may require a company to furnish information regarding its constitution and working. It may reverse a decision of directors in their discretion to refuse registration to a transfer of shares. Its sanction is required to any enhancement of a director's remuneration. It may direct the amalgamation of companies, if it regards this as being in the national interest.

Under the Act of 1956 government may notify that companies engaged in specified activities shall not have managing agents. A company subsequently incorporated cannot have a managing agent, and the term of office of a managing agent in an existing company will expire after three years. A managing agency company may not have a managing agent; no company may appoint a subsidiary as its managing agent. In companies not hit by these prohibitions, no managing agent can be appointed or reappointed except by the company in general meeting and with the approval of government.

There are other provisions applicable to public companies and private companies not exempted. A managing agent may not be appointed for more than fifteen years or reappointed for more than ten. The terms of a managing agency agreement may not be varied without government sanction. Managing agencies existing at the commencement of the Act terminated on July 15, 1960, unless renewed under the Act. No person may be managing agent for more than ten companies. The remuneration of a managing agent must not exceed 10 per cent. of the profits.

A managing agent may be removed for fraud, breach of trust,

gross negligence or gross mismanagement by the company in general meeting. A managing agency is not transferable. A managing agency created after the Act is not heritable. An agreement made before the Act for succession to the office of managing agent of a public company is inoperative unless approved by government. Where a managing agency is held by a firm or body corporate, it is terminated by any change in its constitution which is not approved by government.

Indian Law Relating to Banks

The Amending Act of 1936 added to the Companies Act of 1913 provisions relating to banking companies, but these did not prove satisfactory, so that in 1944 a Bill dealing with the subject was introduced in the Central Legislature and circulated for opinion. On account of the variety of the comments received a fresh Bill was drafted and referred to a select committee which reported in 1947. When the report was placed before the Constituent Assembly, the number of amendments tabled was so large that again a fresh Bill was drafted, which, when enacted, became the Banking Companies Act, 1949. There have been eight amending Acts, the most important being the Act of 1953 which completed the part of the Act containing provisions for speedy winding up.

The Act contains a detailed definition of "banking"; no company may use "bank," "banker" or "banking" as part of its name, unless it carries on banking as defined; if it does, it must use one of these words and may not engage in trade. It may not have a managing agent or be managed by a person engaged in any calling other than banking. It cannot form a subsidiary company except to carry on prescribed activities included in the definition of banking. It cannot acquire shares in another company in excess of 30 per cent. of its own paid-up capital or that of the other company or in any company in which its managing director is interested. It may not employ a person who has been adjudicated insolvent or has been convicted, or remunerate any employee by commission.

If it is incorporated outside India, its paid-up capital and reserves must be at least fifteen lakhs or, if it has a place of business in Calcutta or Bombay, twenty lakhs, and it must keep on deposit with the Reserve Bank cash or securities to that amount. If it is incorporated in India, the amount is five lakhs or, if it has a place of business in Bombay or Calcutta, ten lakhs; if it operates in one State only, the amount varies from one to five lakhs. Its subscribed capital must be at least half its authorised capital and it may not charge its unpaid capital. Preference shares are not permitted, unless

issued before July 1, 1944, and no member may exercise voting rights in excess of 5 per cent. of those of all shareholders.

It cannot carry on business or open a new branch without a *licence from the* Reserve Bank. *It must obey directions* given by the Reserve Bank in granting advances; it cannot grant loans on the security of its own shares and it must submit to the Reserve Bank monthly returns of unsecured loans. It must have, at the close of each day, cash, gold or securities to the value of 25 per cent. of its *liabilities and at the close of each quarter 75 per* cent. It must submit monthly returns of assets and liabilities to the Reserve Bank, which may issue such directions as it thinks fit in the national interest or to secure proper management. No appointment or reappointment of a managing director may be made without the approval of the Reserve Bank. The Reserve Bank may prohibit any class of transactions, or cause an inspection to be made, in the course of which it may prohibit the receipt of fresh deposits or direct the bank to apply to be wound up. The Reserve Bank may require a *directors' meeting* to be called, at which an officer of the bank will have a right to be heard; it may appoint an officer to report on the working of the bank and require it to make such changes as it thinks necessary.

The Reserve Bank was created by the Reserve Bank of India Act, *1934, and nationalised by the Reserve Bank (Transfer to* Public Ownership) Act, 1948. It has a capital of five crores. There are four local boards and one central board of directors, all appointed by the Central Government, which may supersede the board *for* failure to carry out its obligations.

The bank must accept money on account of the Central Government, make payments up to its credit, carry out its banking operations and manage the public debt. By arrangement it may transact similar *business for a State. It has the sole right to issue bank notes* and has a monopoly of the issue of promissory notes payable to bearer on demand. It issues coin in exchange for notes and vice versa. At the close of each week and each financial year there is an exchange of coin for notes between the bank and government, the direction and amount depending on the amount of coin held as an asset by the bank. A Schedule to the Act contains a list of banks, which may be amended by the bank. These banks enjoy the privilege of being entitled to engage in banking activities in which public *authorities* are involved. A scheduled bank *must have paid-up* capital and reserves amounting to five lakhs and, on pain of payment of heavy penal interest, maintain with the Reserve Bank an average daily balance of 5 per cent. of its demand liabilities and 2½ per cent. of its time liabilities, exclusive of its paid-up capital, reserves, balance

on its profit and loss account and loans from the Reserve Bank. It is obliged to send weekly returns to the Reserve Bank of its liabilities, borrowings, notes and coin in hand, investments, advances and bills purchased and discounted.

A bank having close relations with Government is a national necessity. Such banks were established in the three Presidency Towns and eventually regulated by the Presidency Banks Act, 1876. In 1919 the three banks drew up a scheme for their amalgamation, which was welcomed by government, partly because it was contemplated that the new bank would establish branches in the 200 districts in which the Presidency Banks had no branches, most of which had no bank at all. The scheme was implemented by the Imperial Bank Act, 1920, shareholders and stockholders in the Presidency Banks being allotted shares in the Imperial Bank at exchange rates prescribed by the statute. The State Bank of India Act, 1955, was enacted to ensure national control and take over the Imperial Bank. At its inception the issued capital was 562,500 shares of Rs. 100 each, vested in the Reserve Bank, being the equivalent of the shares in the Imperial Bank, for whose holders compensation was provided by the Act. The authorised capital is twenty lakhs of such shares and the Central Board may increase the issued capital, provided that the Reserve Bank holds 55 per cent. of the issued capital. The consent of the Central Government is necessary to an increase beyond twelve and a half lakhs. The head office is in Bombay and there are local head offices in the Presidency Towns. No branch set up by the Imperial Bank can be closed without the approval of the Reserve Bank. The Central Board consists of a chairman and vice-chairman appointed by the Central Government, six directors elected by shareholders other than the Reserve Bank, eight directors appointed by Central Government to represent territorial and economic interests, one other director appointed by the Central Government and one appointed by the Reserve Bank; the board can, with the approval of the Central Government, appoint two managing directors. The State Bank acts as agent for the Reserve Bank where the latter has no branch. Subject to restrictions in the Act, the State Bank carries on normal banking activities and, with the sanction of government, may acquire the business of other banks. By an amendment made in 1955 to the Coinage Act, 1906, a decimal coinage was introduced. The rupee continues to be legal tender for any sum, the half rupee, equivalent to fifty naya paisa, for any sum up to ten rupees and any smaller coin for payments up to one rupee. The Central Government may, by notification, call in old coins and declare them no longer admissible as legal tender.

The first draft of the Negotiable Instruments Act, 1881, was prepared by the Third Indian Law Commission and was based on English principles, but it met with opposition in the Indian Legislature. The Commissioners had dispensed with some rules whch they regarded as unnecessary or unsuitable for India, though these were followed in Anglo-Indian mercantile practice; they made no exceptions in favour of vernacular instruments and their definitions were open to criticism. After fourteen years' work, involving considerable revision, the Act was passed in 1881, one year before the (British) Bills of Exchange Act. Superficially there is little resemblance between the two statutes but there is little difference in their scope and application.

The Indian Act appears to deal inadequately with conflict of laws and vernacular instruments. Regarding the latter, it says that local usages relating to them will override the Act unless excluded by the words of the instrument. The result is that some dealers in *hundis* decline to accept them unless they contain a provision to that effect. But a great volume of business, especially in Western India, is done by means of vernacular instruments, which deserve more study than they have received, not only because the incidents attached to them meet special needs of Indian commerce but also because it is very rare for such instruments to come before the courts. A *shah jog hundi* passes by delivery without indorsement from *shah* (a worthy and substantial merchant) to *shah*; the drawee can claim the amount paid with interest from the *shah* to whom he has paid, if the *hundi* is stolen or forged. A *jokmi hundi* is drawn against goods shipped on a vessel and is only payable on delivery of the goods.

Acts Dealing with Insurance

Insurance for some considerable time was almost a monopoly of British companies. At first, life assurances were only accepted from Europeans and their descendants, and for heavy premiums. Failures similar to those which resulted in the (British) Insurance Act of 1870 evoked the suggestion that life insurance in India should be State-controlled, but this was rejected owing to the absence of vital statistics, the difficulty of ascertaining the age of an insured person and procuring a satisfactory certificate of death; the burden it would cast on the revenues of India was uncertain; there was then no evidence that Indians generally regarded an insurance policy as a necessary, still less a profitable, investment.

By 1912, the number of Indians with life assurances had increased, but they were confined to the professions, to persons engaged in clerical occupations, and to some merchants; they usually

paid higher premiums than Europeans. There had been more failures but there were now enough Indian companies to make their views heard; the Indian companies wanted to prevent the registration of mushroom companies; they observed without acclamation that the average value of a policy issued by an Indian company was lower than a foreign company's, and they attributed this in part to what they regarded as excessive remuneration paid to the foreign companies' agents.

The Provident Insurance Societies Act of 1912 was based on the (British) Friendly Societies Act, and the Insurance Act of 1912 on the (British) Insurance Act, 1909, but, unlike the British Act, the Indian Act of 1912 dealt only with life assurance. As few Indian companies dealt with accident insurance, legislation dealing with it was not deemed necessary.

The Indian Insurance Act of 1912 required an Indian life assurance company to deposit government securities for Rs. 25,000 before commencing business, and thereafter every year to deposit one-third of its gross receipts, until a total of one lakh of rupees was reached; then one-third of its net profits until the total reached two lakhs. This provision was criticised on the ground that the initial deposit was too low to ensure that a new company was sound, and because, notwithstanding that foreign companies were obliged to make deposits before operating in England, and English companies were obliged to do the same in the Dominions, no deposit was required by the Act from companies carrying on business in England under the British Act of 1909.

Though British companies might be exempted, the Act required life assurance companies to file periodical accounts and balance-sheets, actuarial reports, and statements of business transacted. Government prescribed the method of audit, and could order an inspection. The right of amalgamation was restricted.

By 1925 a new draft Bill had been prepared, but progress was stayed until the Clauson Committee published its report on the same subject in England in 1927. While the drafting and discussion of the Bill introduced in 1937 which became the Indian Insurance Act of 1938 proceeded, the views of the Indian companies, the English companies and the insured were strongly pressed. While minutes of dissent are a normal feature of reports of Select Committees in India, the report by the Select Committee on this Act is unique in that every member signed a minute of dissent.

The object of the Act of 1938 was to increase government control over all insurers operating in India by compulsory registration and deposits, restrictions on investments and full disclosure of all relevant

information. Foreign insurers were liable to the same disabilities as were imposed on Indian insurers in their countries. There have been fourteen amending Acts, the most important being that of 1950, which created the office of Controller of Insurance to administer the Act and imposed restrictions on changes of management to prevent speculators getting their hands on insurers' funds and the control of insurers by banks. It also incorporated the Insurance Association of India, of which all insurers are members. The Association has two councils, one consisting of life insurers and the other of general insurers. Each council has an executive committee which conducts examinations for insurance agents, advises insurers on sound practice and business ethics and reports to the Controller insurers who carry on business to the prejudice of the policy-holders. It annually advises the Controller on ceilings for expenses of management and reports to him insurers who exceed the limits prescribed.

The Act of 1938 applies to all types of insurance. Subject to special exceptions insurance may only be undertaken by a public company or a co-operative society, registered by the Controller annually. An insurer must have a working capital of Rs. 50,000 in addition to a sum deposited for the Central Government with the Reserve Bank of Rs. 1,500,000 or more according to the kind of business done. A register of policies and claims must be maintained. Audited accounts must be submitted to the Controller annually in addition to the report of the triennial actuarial investigation. The Controller may call for further information, examine any officer of the insurer and decline to accept any return until corrected. Failure to correct, like failure to submit a return, may be visited with fine or result in the Controller filing a petition to wind up.

Every insurer must keep invested the amount necessary to meet liabilities on life insurances in India; one-fourth must be in government securities, another fourth either in government securities or approved investments specified in the Act. Annual and quarterly statements of investments have to be furnished to the Controller. An insurer may not lend money except on a life insurance and within the surrender value.

No managing agent of an insurance company could continue to hold office after the expiry of three years from the time when the parent Act came into force. Except by leave of the Central Government a managing director may not engage in other employment. Government may direct the Controller to investigate the affairs of any insurer. On the report of the Controller it may place control of the business of an insurer carrying on life insurance in the hands of an Administrator, if it thinks the business is being carried on to the

prejudice of the policy-holders. This will normally mean that no more policies will be issued and may end in winding up or the transfer of the business to another insurer. An insurer incorporated in India or with its principal office in India may not transfer its life insurance to another insurer or amalgamate with another life insurer except under a scheme sanctioned by the Controller.

A life insurance policy may be transferred by indorsement but notice is necessary to make it effective against the insurer. The holder of a life insurance policy may nominate a payee but this will not bind the insurer unless it is incorporated in the text or indorsed on the policy and communicated to the insurer. The payee is a bare trustee for the persons entitled to the estate of the insured on his death, unless she is his wife, in which case the form of the nomination may amount to a declaration of trust for her. No life insurance policy shall be called in question two years after being effected on the ground that any statement in the proposal, other than the statement of age, was false or inaccurate, unless the insurer proves that it was material and the holder knew it to be false. The holder of a policy issued in India is entitled to payment in India. If there are conflicting claims for payment on a life insurance policy, the insurer may apply to pay the money into court, where the claims will be heard. If the amount is less than Rs. 2,000, this may be done by the Controller.

No person may act as an insurance agent unless licensed by the Controller and no licence will issue to a minor, insane person or a person judicially held guilty of fraud or dishonesty. No commission may be paid for procuring insurance business to any person other than an insurance agent, whose commission is limited to 40 per cent. of the first year's premiums and 5 per cent. for renewal. For life insurance the amount is a little more.

The Act also contains provisions regarding provident societies (which cannot pay annuities in excess of Rs. 100 or gross sums exceeding Rs. 1,000), mutual insurance societies (which have no share capital) and co-operative life insurance societies.

In January 1956 an Ordinance was made vesting the management of all life insurance in the Central Government. This was replaced by the Life Insurance Corporation Act, which transferred all assets and liabilities of life insurers to the Insurance Corporation of India, consisting of not more than fifteen persons appointed by the Central Government. The Corporation enjoys the exclusive privilege of carrying on life insurance in India, except in respect of persons ordinarily resident outside India. The activities of the Corporation

are to a great extent governed by the provisions of the Insurance Act, 1938.

Under the Motor Vehicles Act, 1939, no person may use, except as a passenger, or permit to be used any motor-vehicle unless the use is covered by a policy of insurance issued by a qualified insurer. In the case of a goods vehicle the policy must cover, in respect of a single accident, compensation for death or bodily injury to six employees other than the driver. In the case of a passenger vehicle it must cover Rs. 20,000 in respect of employees and the same amount in respect of passengers; if the vehicle does not carry more than six passengers the policy must also provide up to Rs. 4,000 for an individual passenger; if it does carry more than six passengers it must provide up to Rs. 2,000. In the case of any other vehicle, the policy must cover the liability incurred.

There are other statutes dealing with State insurance, mostly of industrial injuries; these will be dealt with in the next chapter.

Legislative capacity under the Constitution is concurrent with regard to contract, specific relief, trusts, sale of goods and partnership.[6] Parliament alone can legislate on the incorporation, regulation, and winding up of trading corporations, including banking, insurance and finance corporations, and non-trading corporations, except those with objects confined to one State, co-operative societies, and most universities.[7] The Reserve Bank, banking, negotiable instruments, and insurance are also on the Union List.[8] The incorporation, registration, and winding up of the excepted corporations are within the exclusive competence of the State Legislature. Unincorporated societies and co-operative societies are also on the State List.[9]

[6] Sched. 7, List 3, items 7 and 10.
[7] Sched. 7, List 1, items 43 and 44.
[8] Sched. 7, List 1, items 38, 45, 46 and 47.
[9] Sched. 7, List 2, item 32.

CHAPTER 19

LAWS RELATING TO INDUSTRY

Factory Acts

Until the passing of the first Indian Factories Act in 1881, what little legislation there existed on this subject was confined to making breaches of certain contracts of service criminal offences. All such legislation, except the provision in the Penal Code dealing with the breach of contract to attend to the needs of a helpless person, has been repealed, and replaced by legislation imposing increasingly heavier burdens on the employer. The development has been generally on the same lines as in England but with a lag, due to the later development of industry in India, and with a tendency at first to leave certain matters to be dealt with by Provincial Statutory rules, elasticity being necessary to allow for different conditions and different stages of development in different parts of India. In later Acts greater uniformity was imposed by direct legislation on matters formerly delegated. Many principles and much of the language of English Acts have been borrowed. In addition, India has been a member of the International Labour Organisation ever since its inception in 1919, and has given statutory effect to its conventions ratified by her, such as the conventions on hours of work, on night work for women and children, on the weekly rest, on compensation for occupational diseases and provision for maternity benefits. Many of the recommendations in the 1931 report of the Royal Commission on Labour have been accepted and the Philadelphia Charter of the International Labour Organisation of 1944 has inspired much of the legislation which has been subsequently enacted in India.

The distribution of legislative power between the Centre and the units effected by the 1935 Act has sometimes provoked irritated comment from Indian public men in a hurry to get things done but if we examine the Legislative Lists under the Constitution to see where legislative power now lies over the subject-matter of the Acts to be considered in this chapter, we find little change.

Industries constitute a matter on the State Legislative List,[1] unless Parliament, by declaring it necessary in the public interest, gives itself exclusive legislative capacity in respect of particular industries.[2]

[1] Sched. 7, List 2, item 24.
[2] Sched. 7, List 1, Item 52.

Factories, boilers and electricity are on the Concurrent List.[3]

The regulation of labour and safety in mines and oilfields is a Union subject; regulation and development of oilfields and mineral oil resources also can only be the subject of Parliamentary legislation.[4] Regulation of mines and mineral development is primarily a State subject,[5] but Parliament may encroach upon the State sphere by declaring Parliamentary legislation expedient in the public interest.[6]

Economic and social planning, commercial and industrial monopolies, trade unions, industrial and labour disputes (except disputes concerning union employees), social security and social insurance, labour welfare, provident funds, employers' liability, workmen's compensation, invalidism and old age pensions, and maternity benefits are on the Concurrent List,[7] but industrial disputes concerning union employees are on the Union List.[8]

Where legislative power was concurrent, more attention was paid to these subjects by the Legislatures of mainly industrial Provinces such as Bombay, so that, in 1942, a Permanent Labour Organisation, composed of representatives of the Centre, the Provinces, the Indian States, Capital, and Labour, was set up to promote uniformity in labour legislation, to settle procedure for dealing with industrial disputes and to consider labour welfare. In 1947 the Labour Department of the Central Government drew up a Five Year Plan, whose legislative programme has as yet been only partly implemented.

Indian factory legislation has followed a course similar to that pursued in England. A Factory Act is followed by amending Acts; then comes consolidation and repetition of the process. Progressively the definition of a factory is broadened, matters at first left to the discretion of inspectors or to the rule-making powers of Provincial Governments are precisely defined by the statute; health and safety provisions are increased; more protection is given to women and children; hours of work are restricted, and provisions for labour welfare are added. The Act of 1881 was superseded, after amendment in 1891, by the Act of 1911, which, after four amendments, was superseded by the Act of 1934. Eight amending Acts followed before the present Act of 1948, which borrowed considerably from the British Act of 1937, appeared on the Statute Book. There have been three amending Acts.

Any manufacturing establishment employing ten persons and

3 Sched. 7, List 3, items 36, 37 and 38.
4 Sched. 7, List 1, items 55 and 53.
5 Sched. 7, List 2, item 23.
6 Sched. 7, List 1, item 54.
7 Sched. 7, List 3, items 20, 21, 22, 23 and 24.
8 Sched. 7, List 1, item 61.

using power, or twenty persons without using power, is within the purview of the Act, but a State Government may extend its provisions to any place where anything is manufactured except by the owner and his family. Any person proposing to occupy a factory must give notice, and a State Government may make rules requiring the production of plans and specifications, and its previous sanction, before a factory is erected or extended; the rules may require the licensing and registration of factories.

The Act contains detailed and precise provisions for the cleaning, painting, and whitewashing of factories, the removal of dust and fumes, sanitation, and breathing-space for workmen. Ventilation, artificial humidification, and lighting are to be dealt with in the State Government's Rules.

There are detailed directions for fencing machinery, and precautions against fire and explosion. All new machinery must be cased; hoists, lifts and cranes must comply with the requirements of the Act; stairs must have handrails, and openings in floors must be fenced or covered. Work on moving machinery may only be done by specially trained adults. If an inspector suspects a building or plant to be dangerous, he may call for plans and specifications and make tests; he may prohibit its use until it is made safe or may require specified measures to be taken by a stated date.

There must be adequate facilities for washing, storing and drying clothes and for sitting. If work can be done in a sitting position, the chief inspector may order seats to be provided. First-aid boxes must be kept and, if there are more than five hundred workers, a medical staff in accordance with the State rules must be provided. If there are more than one hundred and fifty workers, rest and lunch rooms must be provided; if there are more than fifty women workers, a crèche must be maintained and State rules may require the supply of free milk. The State may make a rule requiring a canteen to be established in a factory with more than 250 workers. If there are more than 500 workers, welfare officers, whose duties, qualifications and conditions of service are prescribed by State rules, must be appointed.

The Act provides for a forty-eight hour week, a nine-hour day with at least half an hour's rest after five hours' work and a free day in each week. Double rates must be paid for overtime. To ensure compliance with these provisions, registers must be kept, and notices of periods of work posted. Any change in the system of work, such as the introduction or alteration of a shift system, must be reported a week in advance. The employment of women and children between 10 p.m. and 6 a.m. is forbidden.

No person under fourteen may be employed, and a person between fourteen and eighteen must wear a special token and hold a medical certificate, which is valid for a year at most, certifying him as fit either for adult work or child labour; in the former case he must be fifteen years of age, and the rules applicable to adult workers apply; in the latter, he may not work for more than four and a half hours a day.

Every adult male who has worked for 240 days in a calendar year is entitled to one day's leave for every twenty days worked in the previous year; every child is entitled to one day's leave for every fifteen working days. Days on which the employee is laid off by agreement, maternity leave taken by a female up to twelve weeks and leave earned in the previous year count as working days. Leave not taken in one year may be carried forward into the next up to a total of thirty days for an adult and forty for a child. An employee intending to take leave must give fifteen days' notice. His leave pay will be the daily average of his full-time earnings in the preceding month, excluding bonus and overtime but including a cash equivalent of concessional sales. A leave scheme may be drawn up by the manager in agreement with the works committee*; it must be lodged with the chief inspector and conspicuously displayed in the factory for a year before it comes into force.

If a State Government regards operations carried on in a factory as likely to expose employees to serious risk of injury or disease, it may make rules prohibiting the employment of women and children, providing for periodic medical examination of employees and the protection of all persons employed in the operation or near where it is carried on; the rules may also prohibit or control the use of specified materials.

A manager must report immediately to the prescribed authority any accident causing death or bodily injury involving absence from work for forty-eight hours and any other accident which he is specifically required to report. He must also report the occurrence of any of the industrial diseases scheduled in the Act; the same duty is cast on a medical practitioner treating any such disease. A State Government may appoint a competent person to inquire into the cause of any accident or any case of any scheduled disease. An inspector may take samples of any substance used in a factory in contravention of the rules or likely to cause injury or disease to employees.

* Under the Industrial Disputes Act, 1947, works committees, if government so directs, must be set up where there are over one hundred workers; the labour representatives must not be fewer than the employers'. Their function is to preserve good relations between employer and employees.

For contravention of any provision of the Act for which no special penalty is provided, the occupier or manager may be liable to three months' imprisonment or fine of Rs. 500 or both and for a continuing offence to Rs. 75 per diem in addition. For subsequent offences, the maxima are six months and fine of Rs. 1,000. If parts of different premises are leased as separate factories to different persons, the owner may be liable for infringements. A manager charged with an offence may produce the actual offender and establish that the offence was committed without his knowledge or consent, despite the exercise of due diligence in enforcing the Act.

Mines Acts

In legislation dealing with mines, which are a Central subject, progress has followed a pattern similar to that observed with regard to factories, but the pace has been slower. The Act of 1901 provided for an inspectorate and dealt with health and safety.

It was superseded by the Act of 1923, which set up mining boards, comprising a chairman and a member appointed by the Central Government, an inspector and two representatives each of mine-owners and miners. Under powers in the Act, the Central Government made rules for courts of inquiry into accidents, sanitation, safety, medical services, maintenance of plans, qualifications of officials, rescue, haulage, ventilation and precautions against explosion.

Managers were obliged to make approved by-laws. An inspector could give notice to a manager to rectify any defect endangering safety. Serious accidents, explosions and flooding had to be reported.

Employment of adolescents was severely restricted. The Act restricted employment of adults to a six-day week of fifty-four hours, the maximum daily tour underground being nine hours.

The Act of 1923 was repealed by the Act of 1952, which, apart from providing stricter control of management and enhanced privileges and protection for miners, removed the anomaly that some employees at a mine were subject to the Factories Act. An amending Act of 1959, apart from enhancing penalties, inserted provisions for holidays with pay like those in the Factories Act, 1948, and extended the provisions of the parent Act to quarries and open-cast workings, though with a very limited application to excavations by prospectors and small quarries.

Under the Act of 1952, as amended, a mine is any excavation where operations are proceeding or have proceeded to search for or obtain minerals, together with all borings, shafts, levels, open-cast workings, conveyors, plant, workshops, power stations, premises for

the disposal of refuse and, unless exempted by the Central Government, any adjacent premises in which ancillary processes are carried on. But only the provisions of the Act dealing with inspection and hours of work apply to an excavation by a prospector and quarries from which building stone, road metal, limestone and similar minerals are extracted.

The Central Government appoints a duly qualified chief inspector and inspectors, empowered to enter on and inspect mines to ascertain whether the Act and the rules under it are observed. It also appoints certifying surgeons who examine and certify adolescents, examine miners engaged on dangerous processes and supervise cases of illness due to conditions in mines or of adolescents engaged in unhealthy work. Mining boards, constituted as under the Act of 1923, are appointed for groups of mines and may exercise the powers of an inspector.

A mineowner or his manager must give a month's notice before mining operations commence. Every owner, agent and manager is responsible for the Act and rules being observed and is deemed guilty of any contravention, unless he proves that he has taken all reasonable means to prevent it.

Every mine must have sufficient pure, cool, drinking water at convenient places, sufficient latrines and urinals, first aid equipment and conveyances to take injured persons to hospital. An inspector may give a manager notice of any matter, not dealt with by the Act, likely to endanger human life and safety. Any accident causing death or serious injury, any explosion, any influx of gas, any breakage of ropes or gear for raising men or material, any overwinding of cages and any premature collapse of workings must be reported. Cases of notified diseases, such as silicosis and pneumoconiosis, must also be reported. The Central Government may order inquiries into the matters reported.

No one may work in a mine more than six days in a week, except in an emergency, in which event compensatory holidays must be given. An adult may not ordinarily work more than forty-eight hours in the week, nine hours in the day above ground or eight hours in the day underground. Overtime must be remunerated at double rate. No adolescent may work underground unless he is sixteen and has a certificate, renewable annually, of fitness to work as an adult; he may only be employed between 6 a.m. and 6 p.m. and must have half-an-hour's rest after four-and-a-half hours' work. An adolescent not so certified may work above ground for four and a half hours a day between 6 a.m. and 6 p.m. No child (*i.e.*, a person under fifteen) may be employed in a mine. No woman may work below ground or, except between 6 a.m. and 7 p.m., above ground.

Under the Oilfields (Regulation and Development) Act, 1948, the grant of prospecting licences and leases for winning mineral oils, the kind of person to whom they may be granted, the maximum areas and rents, are all subject to rules made by the Central Government, which may also regulate development and provide for modification of leases by rules. The Mines and Minerals (Regulation and Development) Act, 1957, leaves less to the discretion of the Central Government but it prohibits the grant of a prospecting licence or lease except to a person holding a certificate from the income tax office; he must also be an Indian citizen or a company under Indian control. The maximum area of a mining lease is ten square miles; the maximum period for most minerals is twenty years, renewable once for the same period.

As the Indian Government has assumed responsibility for the future development of coal, the Coal Bearing Areas (Acquisition and Development) Act, 1957, empowers the Central Government to notify its intention to prospect for coal in any area, whereupon prospecting licences are automatically cancelled and mining leases suspended. If the results of the prospecting operations warrant it, the Central Government may notify its intention to acquire rights in the land and may vest these in a government company. Compensation for expropriation is provided.

Alarmed about the shortage of metallurgical coal, the Indian Government sponsored the Coal Mines (Conservation and Safety) Act, 1952, which establishes a Coal Board with a chairman and not more than six members appointed by the Central Government for not more than five years. Its function is to maintain safety in mines and conserve coal. It may, if it thinks it necessary, itself undertake such operations as filling with sand spaces left underground by the extraction of coal. The Central Government may issue orders to mineowners for the maintenance of safety in mines or conservation of coal. It may impose an excise not exceeding Rs. 1 per ton on coal dispatched from collieries and an additional duty of not more than Rs. 5 per ton on metallurgical coal and an equivalent impost on the recipient. The money raised is paid into a special fund used for administering the Act and research.

The Mines Maternity Benefit Act, 1941, was the first Indian Act dealing with maternity benefit; it has been amended three times, and the benefits have been extended. No woman may be employed in a mine during the four weeks following delivery of a child; a woman may obtain leave for a month preceding the date on which delivery is expected, and, if she has been in the same employ for six months preceding delivery, she is entitled to twelve annas a day during the

four weeks preceding and the four weeks succeeding the date of delivery; if she accepts the services of a qualified midwife, she is entitled to a bonus of Rs. 3. The benefits are payable by the employer.

The Mica Mines Labour Welfare Fund Act of 1946 created a fund into which a cess, not to exceed 6¼ per cent. of the value of mica exported, is paid; the fund is applied by the Central Government to the welfare of mica workers, in providing public health services, water supplies, houses, transport, and social, recreational and educational amenities. Advisory committees not exceeding one for each State are appointed by the Centre, capital and labour being equally represented.

The Coal Mines Labour Welfare Fund Act of 1947 imposes an excise duty of four to eight annas a ton on coke and coal dispatched from collieries, the proceeds being apportioned by the Centre between the Labour Housing Fund and the General Welfare Fund. A Housing Board, consisting of the Labour Welfare Commissioner and other members appointed by the Centre, appropriates the former fund to the preparation and implementation of housing schemes, and maintenance and repair of houses. The General Welfare Fund is applied by the Centre to labour welfare. A grant in aid of dispensary services at a colliery, not exceeding the net proceeds of a duty of eight pies per ton on coal dispatched from the colliery or the expense incurred by the owner, whichever is less, may be paid to an owner whose expenditure on these services exceeds Rs. 80 per mensem. Before any expenditure other than routine or urgent expenditure is incurred, the advice of an advisory board must be considered; this has an official chairman and representatives of capital and labour appointed by the Central Government.

The first Indian legislation dealing with compulsory membership to provident fund schemes for workers was a Governor-General's Ordinance of 1948, replaced by the Coal Mines Provident Fund and Bonus Schemes Act of 1948. The Central Government may frame and notify a provident fund scheme and a bonus scheme, specifying the mines to which they apply. A provident fund scheme must specify, *inter alia*, the classes of employees which may join, the contributions of employer and employee, the costs of administration payable by the employer, the trustees, the method of accounting, the conditions under which withdrawals are allowed and the nomination of persons to receive the amount to the credit of a deceased contributor. A bonus scheme must specify the period of attendance qualifying for bonus, the class of employee eligible, the rate at which bonus is payable and conditions disqualifying for bonus. The

Coal Mines Bonus Scheme of 1948 applies to all coal mines in West Bengal, Bihar, Madhya Pradesh and Orissa. Employees earning more than Rs. 300 per month and persons employed as domestic servants are not eligible for bonus; other employees qualify after a minimum period of attendance, in no case less than fifty-four days, which differs as between workers under and above ground and as between States. The bonus accrues quarterly and amounts to a third of the basic earnings during the quarter, but a deduction is made for contributions to the Coal Mines Provident Fund. Participation in an illegal strike entails forfeiture of the bonus. Employees in mines who are entitled to bonus are obliged to contribute to the provident fund. The member's contribution is between one-tenth and one-twentieth of his basic wage,[19] and the employer must contribute an equal amount, being responsible for the deduction of the member's contribution from his wages and for affixing the stamps on his contribution card. Each member may nominate the persons to whom the amount standing to his credit in the fund is payable on his death; he may change his nominations, and effect will be given to his wishes. In the absence of nominations, it will be divided between his widow and his descendants. The member may withdraw the amount standing to his credit on retirement after the age of fifty, on premature retirement on account of incapacity for work and, with the leave of the trustees, in certain other cases when he abandons work in a mine.

Plantation Acts

The Indian tea industry is important. The Tea Cess Act, 1903, imposed a cess on tea which was used to promote the sale of tea. The Indian Tea Control Act, 1938, was passed with the object of controlling the export of tea and the extension of tea cultivation. The Central Tea Board Act, 1949, repealed the Act of 1903 and set up a board to develop the tea industry under central control. As the objects of the Acts of 1938 and 1949 were inter-related and as difficulties had arisen in implementing the Act of 1949, it was proposed to make the composition of the board more flexible and to empower the Central Government to fix tea prices. The surviving Acts were repealed and the Tea Act, 1953, set up a board which may consist of as many as forty members appointed by the Central Government to represent owners of and employees on tea gardens, manufacturers of and dealers in tea, consumers, Parliament and State Governments. The board determines the total area in which extension of tea cultivation will be allowed and no one may make a

19 The basic wage excludes allowances for food concessions and house-rent, as well as overtime pay, bonus and commission.

fresh plantation without its consent. The board has opened teashops in most parts of India and in many foreign countries for purposes of advertisement. No tea may be exported except under licence from the board. The Central Government, after consulting the board, fixes the export allotment annually. The activities of the board are financed by a duty of Rs. 8·80 per quintal of tea exported.

As the factory is usually situated on the garden, the provisions of the Factories Act apply to it, but with modifications as to hours of work, as its operation is seasonal. Apart from the Workmen's Compensation Act, the only legislation protecting labour before 1951 was the Tea Districts Emigrant Labour Act of 1932, replacing the Assam Labour and Emigration Act of 1901. The Act of 1932 protects immigrant labour in the tea gardens of Assam, and creates a controlling staff, remunerated out of a cess of not more than nine rupees paid by the employer of each immigrant who has been induced by an advance of money or payment of his fare to go to Assam. Every such immigrant has the right to be repatriated at his employer's expense at the end of three years, or earlier in certain circumstances. The right may be postponed or waived, and it may be enforced by the Controller. Recruitment of labour outside Assam can be controlled by restricting it to licensed persons and by making it obligatory to send recruits by specified routes with rest-houses provided on them.

More than a million Indians are employed on plantations but their conditions of work differ from those of industrial workers to such an extent as to make legislation to protect industrial workers largely irrelevant to their circumstances. The Plantations Labour Act, 1951, was enacted with the object of ensuring them reasonable amenities. It applies to plantations of 10·117 hectares or more, employing at least thirty persons, on which tea, coffee, rubber or cinchona is grown, but the Act can be extended to other plantations by notification. The Act provides for the appointment of inspectors and certifying surgeons, with powers and duties comparable to those in the Mines Act, 1952. The employer must provide pure drinking water at convenient places, latrines, urinals and medical services. A plantation with 150 workers must have a canteen and one with fifty female workers a crèche. State Governments may make rules regarding the provision of recreational facilities, schools for children and housing. A plantation with 300 workers must have a welfare officer.

No adult may work more than fifty-four hours in a week and no adolescent or child more than forty hours. No period of work may exceed five hours. One day in seven must be a holiday. No child under twelve may work and no child above that age unless certified

fit. Holidays with pay must be given at the rate of one day for twenty days worked or, in the case of a young person, one day for fifteen days worked. State Governments may make rules regarding sickness and maternity benefits.

Other Acts Dealing with Conditions of Labour

The Weekly Holidays Act, 1942, leaves it open to a State Government to put its provisions into force. It is applicable to shops, restaurants, theatres, and cinemas. With provision for exceptions, every shop must close on one day in each week, and every employee must have a day's holiday in each week. The State Government may also require shops to close for another half-day, and employees in theatres and restaurants to have a further half-day holiday. No deductions from wages may be made on account of these holidays. The Act provided penalties for its infringement and an inspectorate for its enforcement.

There are State laws dealing with shops, commercial offices, restaurants, and places of entertainment, of which the Bengal Shops and Establishments Act of 1940 may be cited as an example. The Act does not apply automatically to Government offices, offices of public utility services and certain other concerns but it leaves the State Government with a discretion to apply it to any such establishment. Shops must close at 8 p.m., and for one and a half days in each week. Every employee must have one and a half days' holiday with pay each week. Except during stocktaking, the ten-hour day and the fifty-six-hour week must not be exceeded. Overtime must be paid for at one and a quarter times the ordinary rate. Periods of rest must be allowed, and after a year's employment, an employee must be allowed a fortnight's holiday with pay and casual leave on half-pay up to a total of ten days in the year. Registers must be maintained, and an inspectorate is established.

In 1930 an amending Act inserted provisions in the Railways Act, 1890, imposing restrictions on the working hours of certain railway servants. New provisions were substituted by an amendment in 1956. Railway employment is "essentially intermittent" when so declared on the ground that it involves periods of inactivity aggregating six hours in the day; persons engaged in this class of employment are restricted to seventy-five hours in the week. It is "intensive" when so declared on the ground that it is strenuous and involves continuous concentration or hard manual labour; persons so employed must not work for more than forty-five hours in the week on the average in any month. Railway servants employed in a confidential capacity, armed guards, teachers at railway schools and other categories so declared by the Central Government are in

"excluded" employment. All other categories are in "continuous employment" and restricted to fifty-four hours a week.

The Motor Vehicles Act of 1939 provided for employed motor-drivers a fifty-four hour week, and a nine-hour day with half an hour's rest after five hours. The Motor Transport Workers Act, 1961, prohibited the employment of persons under fifteen in any motor transport undertaking and of persons under eighteen unless certified fit. Ordinarily no adult may work more than eight hours a day or forty-eight hours in the week; an adolescent is limited to six hours in the day with a rest interval of half an hour. The Payment of Wages Act, 1936, applies to this employment. Holidays with pay at the rate of one day for twenty working days or fifteen for an adolescent must be given. Other provisions of the Act deal with canteens, rest rooms, uniforms and medical and first-aid facilities.

The Children (Pledging of Labour) Act, 1933, makes it a criminal offence for a parent or an employer to enter into an agreement for the services of a child under fifteen for a consideration payable to the parent but an agreement terminable at a week's notice for reasonable remuneration for the child's services and for the child's benefit is not affected by the Act.

The Employment of Children Act, 1938, was substantially amended in 1939, 1949 and 1951. It prohibits the employment of a child under fifteen, except as an apprentice or for vocational training in any occupation connected with transport of passengers, goods or mail by railway or in any occupation under a port authority within the limits of a port. If a person under seventeen is employed in transport, periods of work must be separated by periods of rest of twelve hours each. No child under fourteen can be employed in any workshop where certain scheduled manufactures are carried on such as making *bidis* (Indian cigarettes), carpets, cement or matches.

The Merchant Shipping Act, 1923, was amended in 1931 so as to prohibit the employment of children on ships. That Act has been repealed by the Act of 1958 which forbids their employment on a ship, other than a training or school ship or a ship worked exclusively by members of one family or a home trade ship of less than 200 tons. No person under eighteen may be employed as a trimmer or stoker, except in a school or training ship or on a motor-vessel or on a coaster; where no trimmer or stoker is available, two persons over sixteen may be engaged to do the work of one. No person under eighteen can be employed on a ship without a medical certificate, renewed annually.

The Dock Labourers Act, 1934, provided for an inspectorate and empowered the Centre to make safety regulations, which, however, were not promulgated until 1947. The Dock Workers (Regulation of Employment) Act, 1945, aims at decasualising dock labour by empowering the Centre with regard to a major port and the State Government in regard to other ports to formulate, with the help of an advisory committee composed of representatives of government, employers and employees, schemes providing for recruitment and registration of dockers and a minimum wage when not actually at work.

The Payment of Wages Act, 1936, aims at securing prompt payment of wages and controlling deductions made by employers. It applies in the first instance only to persons earning less than Rs. 400 a month in factories and on railways but a State Government is empowered to extend it to other persons employed in industry. Wage periods must be fixed and may not exceed one month. In establishments with less than a thousand employees wages must be paid within a week of the end of the period, and in other establishments within ten days. Payment must be in cash and on a working day. A discharged employee must be paid within two days. Deductions are permitted for absence, recovery of advances, and certain other specified dues. Only persons of fifteen and over may be fined, and only for acts previously notified as punishable by fine, and after cause shown. Fines must not exceed one thirty-second part of the wages due, and must be applied for the benefit of employees. Objections to deductions may be made to a magistrate or a commissioner for Workmen's Compensation.

The Minimum Wages Act, 1948, provided for the fixing of minimum wages by the end of 1959 in certain scheduled industries, which include agriculture, plantations, rice, flour mills, carpet making, tobacco manufacture, oil, roads and buildings, tanneries and employment under local authorities. The Central Government fixed the wage for any employment carried on under it or under a railway or in relation to a mine, oilfield, major port or corporation established by a Central Act; the State Government acted in relation to other employments. The governments were advised by nominated boards on which capital and labour were equally represented and one-third of the total number, one of whom was chairman, were independent. They could also set up committees of inquiry. To meet different conditions in different places and employments, the powers given to governments, which included powers of revision, were elastic. Minimum rates for time and piece work, for a guaranteed time rate when doing piece work and for an overtime

rate were contemplated; different rates could be fixed for different classes of work in the same employment and for different localities; the rates could be by the hour, day or month. The rate might consist of a basic rate with an allowance adjustable to the cost of living or a basic rate with concessionary sales of essential commodities or an all-inclusive rate. Governments were also empowered to fix the hours in the normal working day and prescribe periods of rest. Having come to a decision on fixing or revising rates, government publishes its proposals and fixes a date, not less than two months ahead, for taking them into consideration. The advice of the board and relevant committees and representations received are then considered. The finalised order is then notified and comes into force three months later.

The Industrial Employment (Standing Orders) Act, 1946, applies to every industrial establishment with a hundred workers and to other classes of establishment notified by government, but it does not apply to persons governed by the rules for the various civil services or the railway establishment code. The employer or manager must submit to the labour commissioner draft standing orders classifying his employees into permanent, temporary, apprentices, probationers and *badlis* (substitutes), specifying how they are informed of periods of work and rest, holidays, pay-days and wage rates, setting out rules governing attendance, late-coming, applications for leave, restrictions on entering the premises, liability to search, closing and opening of sections, temporary stoppages and the rights and liabilities of employer and employees arising therefrom, termination of employment, suspension, dismissal and acts constituting misconduct, redress for unfair treatment and wrongful acts. The rules made under the Act include model standing orders. On receipt of the draft, copies are sent to the trade union calling for objections within fifteen days. After hearing the trade union and the employer, the standing orders are certified, with or without amendment. An appeal lies to the Industrial Court. The certified orders must be posted at the entrance of the establishment and come into force thirty days after certification or seven days after the determination of the appeal. Except by agreement between the employer and the employees, they remain in force for six months. After that either side may move the labour commissioner for modification.

Workmen's Compensation

Though a draft Bill on the subject was drawn up by Sir Frederic Pollock, there is no Indian code dealing generally with the law of tort, and the principles laid down in English cases, with such modification as different conditions were deemed to make necessary, have

been applied in India. Consequently no claim lay against an employer arising out of the death of an employee until the Fatal Accidents Act of 1855 introduced into Indian law the change effected in England by the Act of 1846. The doctrine of common employment, which prevented an employee from recovering damages for injury due to negligence of a fellow-employee, unless the fellow-employee was incompetent to the employer's knowledge, was part of the law of India until it was abolished by the Employers' Liability Act of 1938.

As the difficulties in the way of an injured Indian employee prosecuting a claim for compensation in a civil court are greater than those to be faced by an injured employee in England, for trade unionism in India is still in its infancy, the need of a Workmen's Compensation Act was proportionately greater in India than in England.

The Act of 1923 follows the scheme of the English legislation and has been amended fourteen times. The amendment of 1933, based on the report of the Royal Commission on Labour in England in 1931, increased the rates of compensation and reduced the waiting period. The amendment of 1946 extended the benefits of the Act, previously restricted to persons drawing Rs. 300 a month or less, to persons drawing up to Rs. 400. The amendment of 1959 removed the discrimination between adults and infants, reduced the waiting period in cases of twenty-eight days' disablement from seven to five days, provided a penalty for non-payment of compensation, lengthened the list of injuries deemed to amount to disablement and enlarged the definition of "workman" and the concept of "occupational disease."

In its present form the Act puts the employer under an obligation to pay compensation to a workman for personal injury caused by an accident arising out of and in the course of his employment, except when the injury does not cause disablement for more than three days or when an injury, not resulting in death, is due to the workman's intoxication or wilful disobedience of a safety rule or express order or to wilful removal of a safety device. A scheduled occupational disease contracted by a person who has been six months in a scheduled employment is deemed to be a personal injury. A workman who has instituted a suit for damages has no rights under the Act, and a workman, who has made a claim under the Act or agreed with his employer as to the compensation due, cannot file a suit. If the injury results in death, the compensation is between Rs. 500 and Rs. 4,500 according to his wages; if it results in total disablement, it is between Rs. 700 and Rs. 6,300. To certain injuries

the Act assigns a percentage loss of earning capacity and for such injuries the compensation is the same percentage of what would be payable for total disablement; for other cases of partial disablement the percentage is proportional to the loss of earning capacity. If a workman has received monthly wages, he is entitled to a half-monthly payment, not exceeding Rs. 30. If the employer does not accept full liability, he must make provisional payments to the commissioner or the workman to the extent of his accepted liability. Questions of liability are decided by commissioners; usually deputy commissioners or their assistants are appointed to perform this duty. Except in cases of compensation to relatives for a workman's death, no application may be made to the commissioner unless the parties disagree. Appeals lie to the High Court. Accidents resulting in death or serious injury must be reported within seven days. If a commissioner hears of a fatal accident from any source, he may call on the employer for a full report which must either admit liability or state the grounds on which it is disclaimed.

State Insurance

The difficulties of putting into force in India a scheme comparable to that in the Beveridge Plan are obviously enormous; the lack of statistical data alone creates a formidable obstacle, but a start has been made with National Insurance by the Employees' State Insurance Act of 1948, the substance of which is mainly the work of Professor Adarkar of Allahabad. Even when the whole Act has been put into force, it will only extend to persons earning Rs. 400 a month or less in factories in continuous operation.

For the purposes of fixing contributions and benefits, employees are divided into eight wage groups. The scheme is to be financed by weekly contributions; an employee with an average daily wage of less than R. 1/- per day will contribute nothing, but his employer will contribute As. 7/- per week; an employee on R. 1/- or more, but with less than Rs. 1/8 will contribute As. 2/-, and the employer will contribute As. 7/-. In the other groups, the employee's weekly contribution will vary from a little less than one-eleventh to a little more than one-sixth of his average daily wage, and the employer's contribution will be double the employee's; the employer is responsible for collection.

The contributions, together with such grants as the Centre, the States, and local authorities are disposed to make, will be paid into a fund controlled by a corporation consisting of the Central Ministers of Health and Labour *ex officio*, three official and two non-official nominees of the Centre, nominees of the States, and representatives of capital, labour, the medical profession, and Parliament, from

among whom, partly by nomination and partly by election, a standing committee is chosen, which administers the affairs of the corporation subject to its general control. The permanent staff include a director-general, an insurance commissioner, a medical commissioner, a chief accounts officer, and an actuary.

To qualify for sickness benefit, an employee must have been a contributor for the preceding six months, and for at least two-thirds of the weeks on which he was not prevented from attending work through sickness or disablement from accident; he must have made at least twelve contributions. No benefit is payable for the first two days, except in the case of a relapse after an interval not exceeding fifteen days. A certificate from a medical practitioner is necessary, and co-operation in the medical treatment prescribed is essential. The benefit takes the form of periodical payments of half the average in employed weeks during the preceding contribution period of the "average assumed daily wage," a sum fixed by the Act according to the employee's wage group. The benefit is not available for more than fifty-six days in a period of twelve months.

A woman employee is entitled to maternity benefit at As. 12/- per day for twelve weeks, of which not more than six precede her confinement, if the minimum twelve contributions have been paid, and at least one of them between the thirty-fifth and fortieth week before confinement.

Disablement benefit, if temporary, is payable to the employee while the disability lasts; if permanent, whether partial or total, it is payable for life. If the disablement is temporary, it is payable at half the average, during the employed periods in the year preceding the accident, of the "average assumed daily wage." The benefit for total permanent disablement is assessed at the same rate. If the permanent disablement is partial, the benefit is a percentage of this rate which corresponds to the percentage of disablement fixed by the Workmen's Compensation Act for the injury sustained. If the injury results in the employee's death, the widow is entitled to three-fifths, and each child to two-fifths of the benefit payable for total disablement, but the widow's right ceases on re-marriage, and a child's on attaining fifteen, or, in the case of a daughter, on marriage, if earlier.

Insured persons and their families will be entitled to free medical treatment.

The Act also establishes a medical benefit council with the director-general of the Indian health services as chairman; the other members include a deputy-director of the health services, the medical commissioner of the corporation, a woman doctor, and representatives of the States, employers, and employees. It will advise on the

administration of, and certification for, medical benefits, and investigate complaints against medical practitioners.

The Act also empowers the corporation to recover from the employer the capitalised value of payments made for disablement benefit when an accident is due to neglect of safety rules. If the sickness rate among insured persons is abnormally high in a particular factory and the corporation attributes this to unhealthy conditions in the factory or in the tenements in which the workers live, it may claim the extra cost of sickness benefit from the occupier of the factory or the owner of the tenements; if the claim is not met, an inquiry may be ordered to determine whether the high sickness rate is due to the cause alleged and, if so, the amount payable to the corporation.

Each State will establish an insurance court, composed of persons with legal qualifications, to determine disputes as to rates of contribution and claims to benefits.

The machinery for working this Act, like that established in many other recent Indian Acts, resembles that ultimately adopted for municipal government in the Presidency Towns; in this Act the analogy is pressed further by the provisions for the supersession of the corporation and the standing committee.

When the Act was passed, it was intended to commence with a pilot scheme in Delhi and Kanpur but this provoked complaints from employers there that their liability to pay contributions would reduce their competitive capacity. The Act was therefore amended in 1951 so as to authorise a temporary levy on all employers of labour, not exceeding 5 per cent. of the wage bill, the rate being higher in the areas where employees pay contributions and enjoy benefits, this being in lieu of the employers' contributions contemplated by the permanent provisions of the Act.

The Personal Injuries (Emergency Provisions) Act, 1962, provided for the making of schemes by government for grants of relief in respect of personal injuries caused by enemy action during the Chinese invasion and for personal service injuries (*i.e.*, injuries or disease sustained by civil defence volunteers arising out of the performance of their duties). The scheme would provide for temporary allowances during incapacity, payments in case of death or permanent disablement, the supply of artificial limbs, medical appliances and medical or surgical treatment.

The Personal Injuries (Compensation Insurance) Act, 1963, provided for the making of a scheme by the Central Government for the benefit of workers in essential services, factories, mines, major ports, plantations and other notified employment. The employer is

liable to pay compensation for death or disablement in addition to the relief available under the Act of 1962 and is insured by government against the liabilities accruing on payment of a premium, though he has the option of assuming responsibility for their payment in whole or in part.

Acts Relating to Trade Unions and Industrial Disputes

It was not until the passing of the Trade Union Act of 1926 that trade unions received legal recognition in India. Previously, the right of association was inherent in the law, but, in the event of a strike, the union's officials stood in peril of being restrained by injunction from inducing a breach of contracts of service, and of being mulcted in damages for procuring such a breach.

The Act of 1926 introduced registration for bona fide trade unions, normally dependent on their rules adequately safeguarding the rights of members and limiting expenditure from the general fund to the specified trade union purposes specified in the Act. No restrictions are placed on the objects of the union. A registered union enjoys a high degree of immunity from legal proceedings but the legal position of an unregistered union remains unchanged. The Act was amended in 1960 to give effect to the recommendations of a labour conference that the registration staff should be increased to prevent delays in registration, that a trade union's rules should prescribe a minimum membership fee of 25 n.p. per month and that registrars should be empowered to inspect a union's books in order to verify its annual returns, which include audited accounts.

The Act defines a trade union as a combination formed primarily to regulate relations between workmen and employers or workmen and workmen or employers and employers or for imposing restrictive conditions on the conduct of trade or business. An application for registration must be accompanied by a copy of the rules, which must set out the objects, the purposes for which the general fund may be used, the conditions under which benefits accrue and penalties are incurred, the methods of appointing officers, amending the rules and dissolving the union. The rules must also provide for maintaining a list of members, the admission of ordinary members employed in the relevant industry and of honorary or temporary members, when necessary to form the executive; the custody of funds and papers must be defined.

A union may constitute a separate fund from contributions levied specially to promote the civic or political interests of its members, e.g., by financing the campaign of a candidate for election to a Legislature or local government board or by distributing political literature.

No officer or member of a registered union is liable for punishment for criminal conspiracy in respect of an agreement between members to further any object to which the general fund may be applied; these objects include the conduct of trade disputes on behalf of the union or its members. No civil proceedings may be brought against a registered union or any officer or member in respect of anything done in furtherance of a trade dispute to which a member is a party on the ground that it induced a breach of contract of employment or interfered with another's business or right to dispose of his capital or labour. A registered union is not liable to civil proceedings for a tort committed in furtherance of a trade dispute by its agent without the knowledge or against the instructions of its executive. A trade dispute is a dispute between employers and workmen or workmen and workmen or employers and employers connected with employment or non-employment or terms of employment or conditions of labour. An agreement between members of a trade union is neither void nor voidable on the ground that its objects are in restraint of trade. No suit lies for damages for breach of an agreement on the conditions on which members of a trade union shall sell goods, transact business, work, employ or be employed.

The Trades Disputes Act of 1929 borrowed from the English Act of 1927 the provision that a strike or lock-out is illegal if it has an object outside the furtherance of a trades dispute within the industry and if it is calculated to inflict hardship on the community and compel government to take a particular line of action. It also provided for reference to a court of inquiry or a conciliation board but only made such a reference obligatory if both sides required it; it did not set up permanent conciliation machinery.

The Industrial Disputes Act, 1947, which has been amended twelve times, creates industrial tribunals and permanent conciliation machinery. Strikes and lock-outs without notice within six weeks of striking or lock-out or within fourteen days of such notices or before the expiry of the specified date for the strike or lock-out or during the pendency of conciliation proceedings or seven days after, are illegal in public utility services, *i.e.*, railways, posts, telegraphs, telephones, public lighting, power, water and sanitation services and safety sections in any industrial establishment. If so notified by government, undertakings concerned with transport, coal, cotton textiles, foodstuffs, iron, steel, banking, cement, as well as defence establishments, fire brigades and hospital services will also be deemed to be utility services. A strike or lock-out is illegal during the pendency of conciliation proceedings and for seven days afterwards, during the pendency of proceedings before a labour court,

tribunal or national tribunal and for two months afterwards or, in respect of matters covered by a settlement or award, while it remains in operation. Penalties are provided not only for instigating and participating in an illegal strike but also for knowingly giving financial aid to an illegal strike.

In any industrial establishment with a hundred or more workmen, government may require the employer to constitute a works committee, on which the workmen's representatives, selected in accordance with rules under the Act, are not less than those of the employer. Its duty is to maintain good relations between employer and workmen by agreement on the removal of the causes of ordinary day-to-day friction.

Government may also appoint conciliation officers for specified areas or industries. A conciliation officer must investigate any existing or apprehended industrial dispute and endeavour to induce the parties to settle. If he succeeds, he must report the settlement to government; if he fails he must, within fourteen days, report all facts and circumstances with reasons for his failure. Government may then refer the matter to a board, labour court, tribunal or national board; if it does not, it must communicate its reasons to the parties.

Government may refer the dispute to a board, consisting of an independent chairman and two or four members equally representing the parties. The board will endeavour to effect a settlement. If it succeeds, it sends a memorandum, signed by the parties to government; if it fails, it acts in the same way as the unsuccessful conciliation officer. Government may then refer the dispute to a labour court, tribunal or national tribunal or it may take no action and give its reasons to the parties.

A labour court, tribunal or national tribunal holds a quasi-judicial hearing and makes an award. Each of these bodies consists of one person, though a national tribunal may sit with two assessors. In a labour court such person must have held judicial office for seven years; in a tribunal, he must be or have been a High Court judge. The jurisdiction of a labour court is limited; only an industrial tribunal can deal with disputes about wages, hours of work, holidays with pay and bonus. A national tribunal is gazetted by the Central Government to hear disputes which are of national importance or which affect establishments in more than one State.

The award is submitted to government and must ordinarily be published within thirty days of receipt and come into force thirty days later. But, if government is a party or the Central Government is dealing with an award of a national tribunal, publication may be delayed on the ground that the award would adversely affect the

national economy or is repugnant to social justice. Government may make an order within ninety days modifying or rejecting the award and lay it before the Legislature; the order will then be effective fifteen days later. If no such order is made, the award becomes effective at the end of the period of ninety days.

A settlement comes into force on the date agreed; if none, on the date on which it was signed. Its period of operation may be agreed; if it is not, it remains in force for six months and thereafter until the expiry of two months' notice to terminate. An award normally remains in force for one year from the date on which it becomes enforceable.

An amendment in 1953, applicable to all industrial establishments with less than fifty workmen other than those which work only seasonally or intermittently, gives a workman with a year's continuous service the right, on being laid off, to be paid at half rate. If such a workman is retrenched, he must be given a month's notice and compensation at the rate of fifteen days' pay for each year of service. A retrenched workman is also entitled to priority when the employer proposes to engage more workmen.

An amendment of 1956 forbids most employers to change conditions of service without notice or within twenty-one days of giving notice.

If the reader is disposed to think that the legislation just considered subjects trade unions to excessive government control, he may also bear in mind the inveterate habit of the Indians of looking to government for initiative and the inevitable mistrust of Indian labour in conciliation to settle its disputes with capital. But the most important factor is the inability of Indian labour to recognise one central workers' organisation to represent it. If there were any such body, it would be possible to entrust it with many powers of control which government is at present obliged to exercise.

Financing Industry

The new pages on the Indian Statute Book are not solely concerned with imposing new burdens on employers. The question of financing industrial development has received consideration, and an attempt has been made to make it less dependent on foreign capital. The Industrial Finance Corporation Act of 1948 is not the first Indian Act of its kind; the Madras State Aid to Industries Act, 1923, had similar objects and machinery in a limited sphere. The Act of 1948 provides facilities for financing capital expenditure in industry but, at the same time, it will necessarily enhance government control over industrial development.

The authorised capital of the corporation is ten crores, half issued at once, the remainder to issue with the sanction of the Central Government. Of the original issue the Central Government and the Reserve Bank each took a crore and three crores were reserved for scheduled banks, insurance companies, investment trusts and co-operative banks but any shares unallotted to them were taken up by the Central Government or the Reserve Banks. The shares are not transferable except to the holders mentioned; they are guaranteed by the Central Government as to repayment and dividend. The corporation may borrow up to a limit of ten times its paid-up capital and reserve fund. It may accept deposits repayable in five years or more up to a total of ten crores.

The chairman of the board of directors is appointed by the Central Government after consulting the board. He holds office for three years and may be reappointed. He may exercise such powers as the board delegates to him and may exercise any power of the board in an emergency. There are four directors appointed by the Central Government, two by the Reserve Bank and six by the other shareholders.

Apart from granting loans or subscribing to debentures in industrial concerns, repayable in not more than twenty-five years, the corporation can guarantee loans raised by industrial concerns, underwrite shares or debentures issued by them and act as agent for the Central Government or the International Bank in relation to loans granted or debentures subscribed by them. It may not lend to or guarantee a loan raised by a single industrial concern for an amount exceeding one crore.

When an industrial concern defaults in repayment, the corporation may move the court for sale of the property hypothecated or for transfer of the management to the corporation. If the latter remedy is granted, the corporation may appoint directors and the old directors vacate office without any claim to compensation. No shareholders' resolution is effective, without the corporation's approval and no proceeding to wind up lies without the consent of the corporation.

So long as the reserve fund is less than the paid-up capital and until the Central Government has been repaid what it has spent in fulfilling its guarantees, the dividend may not exceed that guaranteed by the Central Government; in no circumstances may it exceed 5 per cent.; if after the reserve fund becomes equal to the share capital there is, after declaring a dividend of 5 per cent., any surplus, that must be paid to the Central Government.

Laws Relating to Electricity

The first Indian Electricity Act, passed in 1903, was inevitably a tentative measure and it was assumed that new legislation would soon be necessary. The Act of 1910, though amended nine times, is still in force, the most important amendment being made in 1959. The Act, in its original form, contemplated the generation and supply of electricity in limited areas by licensees who were usually private entrepreneurs or local government boards and the administration of the Act was entrusted to provincial governments. An amendment of 1937 provided for some control and the maintenance of some degree of uniformity by a central electricity board. Amendments in 1959 seem to envisage the elimination of private enterprise.

Licences to supply electric energy are issued by the State Governments, after the issue of notice and the hearing of objections. The licensee may break up streets and do other things necessary for laying his transmission system but he must pay compensation. Overhead lines are forbidden, except in an emergency caused by a break in an underground line. A licence may be revoked for wilful and prolonged default in doing anything required of the licensee or for breach of the conditions of the licence or when the financial position of the licensee suggests inability to perform his obligations. The undertaking is then offered to the State electricity board; if it is unwilling to buy, the State Government may buy it or offer it to a local government board in the supply area. If the offer is refused it may be sold to any willing purchaser. In each case a fair price, determined by a formula laid down in the Act, must be paid. When a licence granted before 1959 expires and at the end of a period not exceeding twenty years specified in a licence granted after that date, the State Government may take steps similar to those permissible when a licence is revoked.

The Act defines and punishes a number of offences, such as theft of energy and interference with a licensee's works. The Central electricity board may make rules on a number of matters, including protection of person and property from contact with or proximity to generators or the transmission system; punishment is provided for breach of these rules.

The Electricity (Supply) Act, 1948, was enacted to enable the introduction of the grid system so that electricity could be supplied to suburban and rural areas; as this would involve co-ordination, it was deemed necessary to establish semi-autonomous electricity boards working on quasi-commercial lines. In 1948 it was not within the provincial legislative power to set up such bodies. The Act has been four times amended. The amending Act of 1956 gave the State Governments supervisory powers over the boards.

The Act, as amended, places planning and control of the generation, supply and distribution of electrical energy in the hands of State boards or inter-State boards, who are under the control of the Central Electrical Authority, which must abide by policy decisions of the Central Government. A State board consists of three to seven full-time members appointed by the State. The board with seven to fifteen others appointed by the State Government to represent local government boards, electricity suppliers, commerce, industry, transport, agriculture and labour form the State electricity consultative council, which advises the board on major questions of policy and major schemes and considers progress.

The board has all the powers of a licensee under the Electricity Act, 1910. It prepares schemes for different areas in the State, paying particular attention to areas without electricity. It can establish its own generating stations, close down existing generating stations or convert them into distributing stations. It can construct new transmission lines or make use of existing lines. It can arrange inter-communication between different areas or stations or between its own and a licensee's systems.

All schemes must be sent to the State Government and the Authority, which consists of not more than six members, who, like the members of the State boards, must have no interest in concerns supplying electrical energy or fuel. The functions of the Authority are to develop a uniform policy, to arbitrate between boards and licensees, to collect data and pursue research. Apart from the financial aspects of a scheme submitted to it, the Authority must consider whether proposed river works will prejudice the optimum development of the river, whether the scheme will prejudice the proper combination of hydro-electric and thermo-electric power and whether the transmission lines are suitable. The board must not sanction a scheme involving expenditure of one crore or more without consulting the Authority.

The board must also give public notice of the scheme and consider representations made by any person interested. Eventually the scheme, with necessary modifications, is sanctioned and published. The board must then give effect to it as soon as is reasonably practicable. The board may borrow money from the State or with the State's consent; the State may guarantee loans to the board. The State Government may give directions to the board on questions of policy; the Authority will decide a dispute as to what is a question of policy.

The establishment or other corporations similar to that set up by the Damodar Valley Corporation Act, 1948, may be anticipated.

This corporation, inspired by the Tennessee Valley Authority, operates in the States of Bihar and West Bengal; it is not only concerned with the generation, transmission and distribution of electrical energy but also with navigation in the Damodar River, the improvement of the Hooghly, water-supply, irrigation, food-control, afforestation, soil erosion, public health, agriculture and industry in the valley. It has a monopoly of the supply of electrical energy at high voltage, with power to fix charges; it alone can construct dams.

The chairman and the two members are appointed by the Centre after consultation with the State Governments; they can neither be legislators, nor have an interest in the matters dealt with by the Corporation. On matters of policy, they must follow directions given by the Centre, and the Centre decides what is a matter of policy. Disputes between the Corporation and the State Governments, where there is no provision for their settlement, will be decided by an arbitrator appointed by the Chief Justice of India.

CHAPTER 20

LAWS RELATING TO COMMUNICATIONS

Acts Relating to Roads and Road Transport

Highways, unless declared by Parliament to be national highways[1] are on the State legislative list.[2] Before the British period there were no roads in India. For eight months of the year traffic could move over the plains with little difficulty and caravan routes were marked by brick pillars and guard houses at intervals. Persons making use of the routes paid tolls to *zamindars* over whose land they passed. The British made roads in and around their civil stations and in 1839 decided to join these up so as to make the Grand Trunk Road, metalled and with bridges and ferries, between Calcutta and Delhi. The Central Government, provincial governments, *zamindars*, traders and Indian princes contributed to the cost; the work was supervised by the Bengal military board of works and executed by provincial authorities. In 1854 the military boards were superseded by provincial public works departments. Between 1860 and 1870 there was a large increase in the number of local government boards, which usually undertook road construction and maintenance. By 1901 there were 173,000 miles of road, of which 37,000 miles were metalled. The adaptation of the internal combustion engine to road motor-vehicles resulted in diversion of resources which otherwise might have gone to railway development to expansion of the road system. In 1928 a Road Development Committee under the chairmanship of Mr. M. R. Jayakar recommended the appropriation of a levy of 2 as. per gallon, subsequently raised to 2½ as., on sales of petrol to a central road fund, which by 1960 was producing an annual yield of 3·6 crores.

In 1943 at a meeting of chief engineers of provinces a road development plan was drawn up with a view to securing that no village in a developed agricultural area should be more than five miles from a metalled road. To achieve this object a series of five-year plans, commencing in 1947 and each involving an expenditure of 120 crores, was to be drawn up. In fact, progress did not come up to anticipation. From 1947 the Central Government accepted financial responsibility for the construction of national highways, of which there were twelve, three more being added in 1961. By 1960

[1] Sched. 7, List 1, item 23.
[2] Sched. 7, List 2, item 13.

the total mileage was 417,000 miles, of which 144,182 miles were metalled. It is now proposed to increase the total mileage to 651,000 by 1981, to have dual carriageways on the national highways and have 1,000 miles of autobahns.

Mechanically propelled vehicles are on the Concurrent Legislative List.[3] Prior to 1914 the law relating to motor-cars was in provincial Acts but in that year they were replaced by a Central Act, the Motor Vehicles Act, 1914, which consolidated the law, making provision for the licensing of drivers and vehicles and laying down safety rules. This Act was framed to deal with motor transport in the early stages of its development but it remained in force after its inadequacy to deal with the problems created by passenger and goods motor transport had become evident. It was repealed and replaced by the Motor Vehicles Act, 1939, which, though amended twelve times, is still in force. It is administered mainly by the States, and sets up regional transport authorities with powers enabling them to exercise a strict control over road transport undertakings. The most important amendment was that of 1956, which provided for the licensing of conductors, created an inter-State transport commission to regulate inter-State traffic, and added provisions to deal with nationalised road services which, in some States, have almost eliminated private operators. It also created tribunals to deal speedily with claims arising out of accidents and enhanced the penalties for offences under the Act.

In its present form the Act provides for driving tests and the issue of driving licences, either for private cars or public transport vehicles, which include both passenger-carrying public service vehicles and goods vehicles. A licence may be revoked if the licensing authority, set up by the State Government, has reason to believe that the holder suffers from any disease or disability rendering him unfit to drive. The same authority may disqualify a holder who is an habitual criminal or drunkard or who uses a vehicle for criminal purposes or who drives to the public danger. A court convicting a person of an offence under the Act or finding that he has used a vehicle for a criminal purpose may, and in certain circumstances must, disqualify him. A conductor on a stage carriage must have a licence; he may be disqualified by the authority or the court in prescribed circumstances.

All motor-vehicles must be registered and produced for registration at the time of applying for registration. The registering authority may refuse registration if the vehicle is defective or does not comply with rules made by the State Government as to its construction,

[3] Sched. 7, List 3, Item 35.

equipment and maintenance. A car registered in one State must be given a new registration number after being a year in another State. Notice must be given to the registering authority of changes in ownership and alterations to the vehicle. Registration may be suspended if the vehicle ceases to comply with the rules or is a public danger or is used for hire without a permit. The maximum weight of goods or number of passengers must be entered on the registration certificate of a transport vehicle and it will not be registered unless a certificate of fitness issued by the prescribed authority is produced.

A transport vehicle normally requires a permit from a regional or State transport authority. The State Government may give directions to the State transport authority regarding fares and freights, long-distance goods traffic on specified roads and permits to operate on alternative routes. The State transport authority is set up by the State to co-ordinate the activities of regional transport authorities and perform the duties of a regional transport authority where none exists or in respect of routes over two or more regions. An application for a stage carriage service must state the routes or area, the number and type of vehicles to be used, the proposed time-table, arrangements for housing and repair of vehicles, comfort of passengers and storage of luggage. The regional transport authority must consider the interests of and advantages to the public, the adequacy of other services and the conditions of the road. Regard must be had to the possibility of running to the time-table without exceeding speed limits. The permit may be granted, with or without modifications or subject to conditions or refused. The same authority must be approached for a permit to use a vehicle as a contract carriage or for a private carrier's permit to carry goods for his own business or a public carrier's permit to use a specified number of vehicles in a particular area. Except in the case of death of the holder of a permit of any of the above kinds, it is not transferable.

The inter-State transport commission is appointed by the Central Government; it can issue directions to State transport authorities and regional transport authorities regarding permits on inter-State routes and may itself grant, revoke or suspend any permit in respect of any such route specified by the Central Government.

The Act lays down maximum speeds for different kinds of vehicles and empowers State Governments to prohibit or restrict the use of heavy vehicles in prescribed areas and do various other things to ensure safety and convenience on the roads. Some safety regulations are laid down in the Act; they may be added to by rules.

The provisions of the Act relating to State transport undertakings override other provisions of law. If a State undertaking deems it necessary to operate in any area or on any route to the exclusion,

complete or partial, of private operators, it must prepare and publish a scheme. Any person affected may file objections, which the State Government is obliged to hear. When published, with or without modification, it is an approved scheme. The regional transport authority is obliged to issue the necessary permits to the State undertaking and to refuse, cancel or modify existing permits. Formulae are provided for the computation of compensation payable by the State undertaking to the holders.

The Road Transport Corporations Act, 1948, was enacted to enable Provincial Governments to establish road transport corporations but it contemplated supplementation by provincial legislation which, it transpired, was not within the provincial legislative power under the Government of India Act, 1935. The Road Transport Corporations Act, 1950, was therefore substituted to overcome the constitutional difficulty. It applies to a State as and when notified and empowers that State to establish a road transport corporation composed of representatives of the Central and State Government. The corporation must secure an efficient, adequate, economical and co-ordinated State transport system. It may, *inter alia*, operate road transport services, provide ancillary services, engage and provide amenities for employees, manufacture, purchase and repair vehicles and acquire property for these and other purposes. The capital is to be provided in a proportion agreed by the Central and State Governments but it is also possible to issue shares guaranteed by the State Government, on the right of transfer of which restrictions may be imposed. The State Government may issue general instructions to the corporation, including directions as to employees and reserves. The corporation must furnish such returns and accounts as the State demands. The State Government may set up a commission of inquiry into the corporation's activities and, on its report, assume control through an administrator of any part of the corporation's undertaking. For persistent default in its duties the corporation may be suspended. It can only be wound up by an order of the State Government, made with the consent of the Central Government.

Tramways are on the State Legislative List[4] but the Tramways Act, 1886, is a Central Act. An application must be made, usually to the State Government by the local government board or by a private person with its consent and in either case with the consent of the authority responsible for the maintenance of the road on which the tramway is to run. The proposal must be published and objections called for and heard. Government may then grant permission for the construction of the tramway, with or without modifications

[4] Sched. 7, List 2, item 13.

or subject to conditions. If the promoter does not start construction within the time specified or suspends construction without reasonable cause or does not complete within the specified time, his powers may be suspended; the use of the completed part may be permitted or it may be removed. If the tramway is completed, the promoter has the exclusive right to run carriages with flange wheels on the tramway but otherwise the rights of the public are not affected. The State Government may fix maximum tolls leviable for use of the tramway. After the tramway has been used by the public for three years, the local government board concerned may represent to government that the public is deprived of the full benefit of the tramway. Government may then hold an inquiry and, if satisfied as to the truth of the representation, grant a licence, for not less than one or more than three years but subject to renewal, to any person. If the use of the tramway is discontinued for three months without sufficient cause, government may put an end to the powers of the promoter or lessee. When this is notified, the authority responsible for the road may remove the tramway at the cost of the promoter. If the promoter becomes insolvent, government may, after hearing the promoter, declare his powers at an end, unless the local government board decides to purchase the tramway. The original order conferring powers on the promoter may provide opportunities for the local government board to purchase the tramway; if it does not, then after twenty-one years or after subsequent periods of seven years, the local government board may, with the sanction of government, give notice to the promoter to sell the undertaking. There are State laws dealing with individual tramways.

The Carriers Act, 1865, does not apply to government as a carrier. A carrier is not liable for loss or damage to property worth more than Rs. 100 of a kind mentioned in the Schedule, which includes precious metal and gems, unless declared when delivered. Provided the carrier has exhibited a notice thereof, he may charge for the risk involved. A carrier may, with some exceptions, limit his liability for other property by a contract in writing. But every carrier is liable for loss or damage arising out of the criminal acts of himself or his servants and he is liable for loss or damage to valuable property which has not been declared, if it is due to negligence; it is for him to establish that there has been no negligence. No suit can be filed against a carrier unless notice is given within six months of the loss or damage becoming known.

Laws Relating to Railways

It was not until 1845 that the East India Company gave serious attention to the question of railway construction in India. At that

time this would obviously involve getting the work done by English companies and these could not be induced to undertake such work without a guarantee of dividends of 5 per cent. Three companies set up short lengths of line running from the Presidency Towns. In 1859 a more ambitious plan was laid down and this resulted in a network of railways radiating from the ports. Subsequently some of the old guaranteed lines were purchased by the State but some State-owned lines were leased to companies to work. By 1905 there were 28,054 miles of railway, 14,705 constructed by the State, 6,933 constructed under guarantee, 3,754 constructed by Indian Princes, 1,459 constructed with government assistance and 74 miles constructed by foreign governments. In 1905 the railway board, still the highest administrative authority, was created. In 1961 there were 35,600 miles of railway, of which 470 miles were electrified and all State-owned except 450 miles of narrow gauge. There are eight government railways, the Southern, Western, Central, North, Eastern, North-Eastern and North-East Frontier; there are ten non-government railways.

Railways are on the Union Legislative List.[s] The first Railways Act was passed in 1854 and three other Acts intervened before the Railways Act, 1890, was passed. This has been amended fourteen times since independence and twenty-six times in all, but is still in force. All powers vested in the Central Government by the Act may, under the Railway Board Act, 1905, be vested in the board. The Railways Act provides for the appointment of inspectors of railways, whose functions are to decide whether new constructions are fit for use, to report on the condition of railways and rolling stock in actual use and to hold inquiries into accidents. The necessary powers to maintain a railway and its services are vested in an "administration"; in the case of a railway managed by government, this means the manager but includes government; in the case of a railway managed by a company, it means the company.

The Act vests in the administration all powers reasonably necessary in regard to entering on and interfering with property for the construction, repair and maintenance of railway works, subject to payment of compensation. The previous sanction of government is necessary to the use of locomotives on a new line and rolling stock may not be moved until rules have been framed and published. Before the line is used for passenger service, a month's notice must be given to government by the administration and the sanction of government must be accorded after scrutiny of the inspector's report.

Government may fix maximum and minimum rates and charges;

[s] Sched. 7, List 1, items 22 and 30.

it may also direct the administration to give special facilities for specified classes of goods or goods consigned by governments. But otherwise an administration may not discriminate or show undue preference in respect of a particular person or kind of traffic. An amendment of 1948 established a railway rates tribunal to hear complaints of preferential, discriminatory or unreasonable charges. The chairman is or has been a judge of a High Court or the Supreme Court; the other two members must have special knowledge of commercial, industrial or economic conditions in India or the working of railways.

Government may make rules as to speed and use of rolling stock, the accommodation of passengers and their luggage, carriage of dangerous and offensive goods, passengers with contagious or infectious disease, the conduct of railway servants and the warehousing of goods. The Act itself contains rules for the working of railways and carriage of passengers and goods. There is a somewhat lengthy chapter of offences and penalties.

The chapter on responsibilities of an administration as a carrier was almost entirely redrafted by an amendment in 1961. As a carrier of goods and animals the administration is not liable for loss or damage resulting from an act of God or war or public enemies or restraint or seizure under legal process or orders or restrictions of the Central or State Government; it is not liable for omission or negligence of the consignor or consignee or natural deterioration or latent defect or fire or explosion or unforeseen risk, provided that reasonable care and foresight are exercised. Goods tendered for carriage are deemed to be at owner's risk, unless the consignor elects to pay the freight for carriage at railway's risk and even then the administration is only liable on proof of negligence or misconduct. The administration is not liable for loss or damage to a passenger's luggage unless he has booked it and received a receipt, or he himself retains charge and negligence or misconduct is proved. If, at the request of a consignor, goods, which would ordinarily be carried in covered wagons, are carried in open wagons, the administration is not liable for destruction or damage. The administration is responsible for delay, unless it proves it was not due to negligence or misconduct. If, due to causes beyond the control of the administration or congestion in the yard or operational reasons, goods are not carried by the route booked or by the usual route, the administration is not deemed to have broken its contract. If goods are delivered to a person who produces the railway receipt, the administration is not responsible if such person is not legally entitled or the receipt is forged or defective. If goods are to be delivered at a private siding

the administration is not responsible for loss or damage after the wagon has reached the point of interchange and the owner of the siding has been informed in writing.

If as the result of an accident a passenger is killed or injured and property accompanying him on the train is damaged, the administration is liable, without proof of negligence or default, to pay compensation not exceeding Rs. 10,000. An application must be made within three months by the person injured or a dependant of the deceased to the claims commissioner, who is not only empowered to decide the maintainability and amount of the claim but also, in a clear case, to order the administration to deposit a sum sufficient to enable him to grant interim relief to the claimant.

Acts Relating to Maritime Shipping

Maritime shipping and navigation, including shipping on tidal waters and carriage of goods and passengers by sea are on the Union Legislative List.[6] From 1838 the Indian Legislatures passed various Acts relating to limited aspects of merchant shipping, and from time to time attempts to consolidate them were made, but the (British) Merchant Shipping Acts applied in India and Indian legislation had to harmonise with them. The Indian Registration of Ships Act, 1841, was, by the force of the British legislation, confined to ships of fifteen tons or under. The Indian Merchant Shipping Act, 1923, consolidated previous Indian legislation. It was amended in 1931 so as to prohibit the employment of children in ships, in 1933 so as to give effect to an international convention on load-lines and in 1953 to include provisions for safety of life at sea agreed at an international convention.

The British legislation was kept in force by the Constitution[7] but there were many grounds for dissatisfaction. There were no provisions for registration of ocean-going ships in India; the Indian Act had no extra-territorial application, so that the British legislation applied to an Indian ship as soon as it left India. An Act of 1949 empowered Indian consular officials to deal with Indian ships outside India and enabled Indian ships to fly the national colours. The Merchant Shipping Act, 1958, codifies the whole law of India on the subject.

There is a national shipping board, consisting of four members of the Lok Sabha, two members of the Rajya Sabha and sixteen others appointed by the Central Government to represent the Central Government, shipowners, seamen and other interests. Its function is to advise government on shipping. There is a director-general of

[6] Sched. 7, List 1, items 25 and 30.
[7] Art. 372.

shipping appointed by government; there are offices of the mercantile marine department, under a shipping master, in each Presidency Town and at such other ports as the Central Government thinks necessary. The Central Government also appoints surveyors and radio inspectors. Seamen's employment offices are established at such ports as government thinks necessary, and welfare officers are appointed at places in and outside India. The Act also established a shipping development fund, into which grants and loans from the Central Government are credited. It is under the control of a committee appointed by the Central Government, which will make loans for the acquisition or maintenance of ships to Indian citizens or companies under Indian control with most of their capital held by Indians.

All Indian ships of fifteen tons and above must be registered at a Presidency Town or at such other port as has a registry. Any ship of 200 tons or more must have officers duly certified under the Act, the number and class varying with the size and nature of the ship. Provision is made for examinations and recognition of certificates granted in other countries.

Shipping masters superintend the engagement and discharge of seamen, secure the attendance of engaged seamen, assist apprenticeship and decide disputes between master and crew. An apprentice must be fifteen and his contract must be in writing and attested by a shipping master. A seamen's employment office maintains a register of seamen, regulates the employment and retirement and the supply of seamen to ships. The Central Government may make rules regarding the training, physical fitness and medical examination of different classes of seamen. A seaman's wages must be paid before a shipping master within four days of his discharge. All ships must have sufficient provisions and water; a foreign-going ship must have a cook holding a certificate under the Act. On every ship over 500 tons, bedding, towels and mess utensils must be provided; on all foreign-going ships and home-trade ships of 200 tons adequate medical stores must be provided; a foreign-going ship with more than a prescribed number of persons on board must have a qualified medical officer. Inspections to ensure compliance with these rules by shipping masters and other officials are provided for.

A seaman who deserts or who is absent without leave or who disobeys orders or assaults an officer or steals ship's stores or cargo is liable to arrest. If it is proposed to punish him with a fine, an entry must be made in the log, signed by the master, the mate and one of the crew. Though an offending seaman may be brought before a court, the court, instead of sentencing him, may order his return to the ship.

No ship may carry more than twelve berthed passengers without a certificate of survey declaring the period for which it will be fit for its purpose, the class of voyages for which it may be used and the number of passengers it may carry. This certificate is only good for a year. Certificates granted outside India may be accepted. Unberthed passenger ships and pilgrim ships may only proceed from or discharge passengers at ports prescribed by government; no such ship may sail without a certificate stating the number of passengers permitted and a document giving the voyage to be made, with ports of call and declaring that she has the proper complement of officers, medical officers and attendants, that there is sufficient food, fuel and water, properly stored, and that there are substantial bulwarks and protection against the weather. Every passenger on a pilgrim ship must have a bunk and there must be adequate hospital accommodation. Before sailing, the master must deliver a signed statement of the number of pilgrims of each sex and of the crew and he must sign a bond with two sureties in Rs. 2,000 to comply with the Act and rules and indemnify government for the cost of repatriating any pilgrim left behind. No pilgrim may embark unless he has a return ticket or has deposited the cost of his return with an authorised officer. The master must note and report the death of any pilgrim.

The Central Government may make rules regarding the construction of the hull, equipment and machinery of Indian passenger ships to comply with the International Safety Convention, 1948, rules to prevent collisions, and rules regarding life-saving appliances. Every passenger ship and every ship of 500 tons or more must have a radio installation; every ship of 1,600 tons must have a radio direction finder. Government may make rules about load-lines; no ship except a coaster of less than 100 tons may go to sea unless it has been surveyed and marked nor may it be loaded so that the load-line is submerged in salt water.

Liability for loss or damage resulting from a collision is normally proportionate to the degree in which each ship was at fault. Liability for loss of life is joint and several, but an owner, from whom has been recovered more than his proportionate share, has a right of contribution against the other. If the owner is not personally at fault, the compensation for loss of life or personal injury cannot exceed Rs. 200 per ton of the ship's tonnage; for injury to property, Rs. 100 per ton; for a claim including both, Rs. 200 per ton. If on or near the coast of India a ship is lost, stranded or materially damaged or causes loss or damage to another ship, the master or person in charge must give notice to the appointed officer, who, after a preliminary inquiry, reports to the Central Government. He may

and, if so ordered by government, must move a court, consisting of a first-class magistrate empowered by government and assisted by two to four assessors, cognisant of maritime matters, to make a formal inquiry. On the report of the court, government may cancel or suspend the certificate of the master, mate or engineer, if wrongful acts, default or incompetence are established. Government may appoint receivers of wrecks to take possession of all wrecks on the coasts within their jurisdiction, to take command of all persons present and assign to them such duties as he thinks fit for the preservation of the vessel, its cargo and the lives of persons belonging to it. He may use such force as he thinks necessary to prevent plunder, disorder or obstruction. He may sell any wreck not worth Rs. 500 or so damaged that it is not worth keeping. The owner of a wreck may claim it or the proceeds of its sale within a year on payment of charges; if he does not, it vests in government. The owner of a wreck is obliged to pay a reasonable sum for salvage; in case of dispute a magistrate may decide when the claim does not exceed Rs. 10,000; if it does, the matter must go to the High Court.

The Act also contains chapters dealing with coasters, sailing vessels, penalties and procedure.

The Bills of Lading Act, 1856, provides that every consignee named in a bill of lading and every indorsee shall have the same rights and liabilities in the goods as if the contract of carriage had been with him. This does not affect any right of stoppage in transit under the Sale of Goods Act, 1930, or any claim for freight against the shipper. Every bill of lading is conclusive evidence of shipment against the person signing it, unless the holder of the bill had notice that the goods were not loaded or the person signing proves that he did so by fraud of the shipper.

The Carriage of Goods by Sea Act, 1925, was enacted to give effect to the convention agreed at the international convention on maritime law at Brussels in 1922 and closely follows the British Act of 1924. Every bill of lading or contract of carriage of goods from an Indian port to any other port must state that it is to have effect subject to the provision of the Act. The carrier (*i.e.*, the owner or charterer) is obliged to make the ship seaworthy, equip and man it properly and make all parts for carrying goods fit for their reception and preservation. He must properly and carefully stow, carry, care for and discharge the goods. On receiving them, he must issue a bill of lading showing the identification marks and the number of pieces or quantity or weight, as furnished by the shipper, who is deemed to have guaranteed their accuracy. Unless notice of loss or damage is given in writing before removal of the goods on arrival or

within three days, if the injury is not patent, removal is prima facie evidence of delivery as described. After loading, if the shipper so demands, the carrier must issue a "shipped" bill: if the shipper has previously taken up a document of title to the goods, he must surrender it against the issue of a "shipped" bill. At the carrier's option the document may be noted at the port of shipment with the name of the ship and the date of payment, and the document so noted is deemed to be a "shipped" bill.

The carrier is not liable for loss or damage resulting from unseaworthiness, unless it is due to want of diligence in making the ship seaworthy or properly equipped or the parts for carriage of goods fit for their reception and preservation, but the burden of proving due diligence is on the carrier. The carrier is not responsible for loss or damage resulting from acts, default or neglect of the master or the carrier's servants in navigating or managing the ship or from fire, perils of the sea, acts of God or of war or public enemies, restraint of rulers or seizure under legal process. Nor is he responsible for loss or damage resulting from quarantine restrictions, acts or omissions of the shipper, strikes, riots, saving life at sea, wastage from inherent quality of the goods, inadequate packing or latent defect. But the carrier must prove that no fault or privity of his and no fault or neglect of his servants contributed to the loss or damage. In any event, compensation is limited to £100 per package, unless the nature and value is declared on the bill of lading. Dangerous goods shipped without the carrier's knowledge may at any time be landed, destroyed or rendered harmless without compensation and at the shipper's expense. A carrier may surrender any right or enlarge any responsibility mentioned above, if it is embodied in the bill.

Lighthouses are on the Union List.* The Lighthouse Act, 1927, was enacted with the object of vesting in the Central Government powers to discharge its duties in this respect when lighthouses became a central subject under the devolution rules made under the Government of India Act, 1919. Previously, statutory powers had been vested by earlier legislation in provincial governments or provincial governments had dealt with these matters as agents of the Central Government. Under the Act the Central Government appoints a chief inspector, a superintendent for defined areas and inspectors of lighthouses, as well as an advisory committee to advise on erection, removal or alteration of lighthouses. There are general lighthouses, recognised as such by government and local lighthouses, but the latter are subject to inspection and control by the Central Government.

* Sched. 7, List 1, item 26.

which may close them or undertake their management. To meet the expense of providing and maintaining lighthouses, the Central Government may levy light dues, not exceeding fifty n.p. per ton payable by ships on arrival at and departure from an Indian port. Clearance will not be granted until the dues are paid and a customs collector may seize the ship or its fitments and detain it until they are paid and, in the last resort sell it or them. The powers given by the Act to the Central Government may be delegated to the director-general of shipping.

Major ports, their delimitation; constitution and power of port authorities; port quarantine and marine hospitals in all ports are on the Union Legislative List.[9] Other ports are on the Concurrent List.[10] The Ports Act, 1908, consolidated the Ports Act of 1889 and five subsequent Acts without effecting any change except by extending the dues payable by the master before a ship could be granted clearance. It has been amended twelve times. The Act empowers the Central Government to declare which are major ports and to extend or withdraw provisions of the Act to or from any Indian port, though a Schedule to the Act sets out the ports to which it applies *proprio vigore*.

The Central Government may define and alter the limits of a port and make rules regarding the entry into, departure from and movement within ports, the regulation of berths and anchorages, the discharge of passengers or cargo, the discharge of oil and water, the bunkering of vessels with liquid fuel, moorings, the use of piers, jetties, wharves, quays and warehouses, the use of fires, lights and signals, the number of crew who must remain on board, matters of public health and quarantine, protection from heat and weather.

Government appoints a conservator for each port; in one of the smaller ports he will be the port officer or harbour master. He may give directions to any vessel necessary to enforce any of the above-mentioned rules, remove obstructions and requisition ships' crews to prevent or extinguish fire. Each port has a health officer who is empowered to enter on any ship and examine any seaman, call for papers and question any person regarding the health of any person on board.

There is a chapter on safety of shipping and conservation which, *inter alia*, forbids interference with buoys, moorings and seamarks without lawful excuse, the improper discharge of ballast, the use of firearms and the moving of vessels without the permission of the harbour-master. Another chapter provides for the levy of port dues for pilotage fees and other services and for their recovery.

[9] Sched. 7, List 1, item 26

[10] Sched. 7, List 3, item 31.

The Act exonerates government from liability for default of a port official or pilot, unless it has ordered or sanctioned the act complained of.

Provisions for the management of the ports in the three Presidency Towns were made in the Bombay Port Trust, 1879, the Calcutta Port Act, 1890, and the Madras Port Trust Act, 1905, all Acts of provincial Legislatures, though since 1921 under the devolution rules power over major ports has been with the Centre. The Major Port Trust Act, 1963, applies to Cochin, Kandla and Vishakhapatam and may be extended to other major ports, except the three Presidency Towns. In ports to which it applies there is a board of trustees; the Central Government appoints the chairman, the deputy chairman and not more than ten others to represent labour, the mercantile marine department, the customs, the State Government, the defence services and the Indian railways; not more than twelve others are elected by notified local bodies representing commerce, shipping and local interests. The chairman and deputy-chairman hold office at the pleasure of the Central Government; persons appointed by virtue of holding a particular office continue for so long as they hold that office; others hold for two years. The board may delegate powers to the chairman, deputy-chairman and committees of its members.

The board maintains and amends a list of necessary employees and their remuneration; it appoints, promotes and grants leave to its employees but is obliged to consult government on higher appointments.

All property, funds, rights and obligations vested in the Central Government for the purpose of the port vest in the board from the date of its first constitution but the board is obliged to repay with interest capital expenditure of the Central or State Governments. The board may enter into contracts, which must be under seal if they exceed a value prescribed by government; no lease may be granted for more than thirty years nor may immovables above a prescribed value be acquired or sold without the consent of the Central Government. If necessary the Central Government will procure the acquisition of property for the board under the Land Acquisition Act, 1894. The board may, with the sanction of the Central Government, raise loans and issue securities, transferable on conditions laid down by the board.

The board may execute such works and provide such appliances within the port as it thinks necessary. When a dock, wharf, quay or pier has sufficient buildings and appliances for landing and shipping goods or passengers and has been approved by the collector of

customs, the board may notify it as ready for use. Thereafter the board may order any sea-going vessel in the port to come alongside it for landing or shipping. When there is sufficient room it may prohibit landing or shipping anywhere else. The board may undertake the landing, shipping and transhipping of goods and passengers, the receiving, storing and delivery of goods, the transport of passengers within port limits at rates prescribed or, with the consent of the Central Government, authorise any other person to do so. The board is not responsible for loss or damage to goods unless a receipt for them has been given nor if such care is taken as a reasonable man would take of goods of the same kind.

Acts Relating to Inland Waterways

Shipping and navigation on inland waterways as regards mechanically propelled vessels, the rule of the road and carriage of goods are on the Concurrent List[11] but, if a waterway is declared by Parliament to be a waterway of national importance, all these matters in relation to it become Union subjects.[12] Other matters connected with inland waterways are on the State List.[13]

The Inland Steam-Vessels Act, 1917, superseded an earlier Act of 1884 and has been amended twelve times. In its original form it forbade the use of vessels which had not been surveyed and declared fit for use, but a new chapter was added in 1951 which requires all inland steam-vessels to be registered at one of the registries notified by the State Government. The registrar may at any time order an inspection of the vessel and cancel the registration if he is satisfied that the vessel is not fit to ply on inland waters. Deck and engineer officers must hold certificates of competency obtained after an examination in accordance with rules made under the Act and these certificates may be cancelled for incompetence or misconduct. Casualties and incidents involving material damage must be reported and the State Government may order an inquiry either by a district magistrate or a special court composed of a magistrate and one to three experts. The State Government may make rules for safety and to regulate the carriage of passengers. It may also fix maximum and minimum fares and freights.

Acts Relating to Aircraft and Airways

Airways, aircraft, air navigation, aerodromes, aeronautical education, carriage of goods and passengers by air are on the Union Legislative List.[14]

[11] Sched. 7, List 3, item 32.
[12] Sched. 7, List 1, item 24.
[13] Sched. 7, List 3, item 13.
[14] Sched. 7, List 1, items 29 and 30.

The Indian Aircraft Act, 1934, has been amended six times. To give effect to the international convention of 1919 on air navigation, the Central Government may make rules covering almost everything connected with aircraft such as manufacture, possession, operation, sale, import, export, the regulation of air transport services and public health. In emergencies government can, in the interest of public safety and tranquillity, cancel licences, prohibit flying and the use of aerodromes and factories and requisition aircraft and machinery for their manufacture and repair. Government may also make rules for the investigation of accidents. The provisions of the Merchant Shipping Act, 1958, regarding wrecks and salvage apply to aircraft. Offences, including flying to the public danger, are defined and penalties provided. No action lies in trespass or nuisance for flying over property at a reasonable height, having regard to the circumstances.

The Air Corporations Act, 1953, created two corporations, Air India International to take over the pre-existing Air India International, Ltd., and Indian Airlines to take over all other Indian air transport undertakings. The two corporations have a monopoly of scheduled air transport to, in, and across India. A three-man tribunal including a judge of a superior court was appointed to determine the compensation to be awarded to the expropriated companies.

Each corporation consists of from five to nine members appointed by the Central Government; one of these is appointed chairman; a person may be a member or chairman of both corporations. It is the function of each corporation to provide, as far as possible on business principles, safe, efficient, economical and co-ordinated air transport, internal or international or both. Each corporation has a general manager, appointed with the approval of the Central Government. There is an Air Council to consider, at the request of either corporation, matters on which the corporations are obliged to consult, such as routes, schedules, fares and freights. The Central Government may give directions to either corporation regarding any of its functions. Neither corporation can, without the approval of government, buy immovable property or aircraft worth fifteen lakhs or more or lease immovable property for more than five years or sell anything worth ten lakhs or more. Government provides the capital of each corporation.

The Carriage of Goods by Air Act, 1934, purports to give effect to the international convention on carriage by air of 1929, though India was not a signatory. It lays down rules regarding passenger tickets, luggage tickets and air consignment notes for the carriage

of goods. A carrier is liable for the death of or injury to a passenger caused while he is on board an aircraft or embarking or disembarking. He is also liable for loss or damage to registered luggage during carriage and while on an aerodrome or on an aircraft where it lands elsewhere. He is also liable for delay. He may disclaim liability by proof that he took all necessary measures to avoid damage or that it was impossible to take such measures. Alternatively he may prove, in regard to goods and luggage, that the loss or damage was due to negligent pilotage or navigation and that he or his agents did everything possible to avoid damage. There are fixed maxima for compensation recoverable. It is not possible to contract out of the statutory rules governing liability. An action for compensation must be brought within two years.

Acts Relating to Posts and Telecommunications

Posts and telegraphs, telephones, wireless and broadcasting are on the Union List.[15] The Post Office Act of 1866, after three amendments, was repealed by the Post Office Act, 1898, which, despite twenty amendments, is still in force. Apart from obvious exceptions, the exclusive privilege of conveying letters is reserved to the Central Government, which is, however, not liable for loss, misdelivery, delay or damage, except in relation to a postal article in the course of transmission, regarding which such liability has been expressly undertaken. The Central Government fixes postal rates not exceeding maxima set out in a Schedule, provides postage stamps and makes rules as to their supply, sale and use. The transmission by post of dangerous substances, matter relating to lotteries and obscene things is forbidden; the rules made by government regarding the transmission of postal articles may, *inter alia*, add to the list of forbidden things; forbidden articles may be delivered to the sender or addressee and an additional charge imposed. A postmaster may give notice to the addressee of a parcel suspected to contain uncustomed goods, giving him the opportunity to be present when it is opened. If so ordered by government, such parcels may be sent to a customs officer. In an emergency the Central or State Government may direct any specified class of articles to be detained and disposed of as directed.

The Central Government may make rules regarding registration, insurance and value-payable postal articles and rules to give effect to international agreements with other countries regarding such matters. Rules may also be made regarding money-orders, including money-orders covered by an international agreement.

[15] *Sched.* 7, *List* 1, *item* 31.

The captain of any foreign-going ship is obliged to accept any mail bag tendered to him by an Indian post office official and deliver it at its destination; the master of a ship bringing mail to India must deliver it without delay at the port post office and report immediately if he has any matter which infringes the Central Government's exclusive privilege. The Act has a chapter defining offences and providing penalties.

The Indian Telegraph Act of 1876 gave no authority to government or any licensee to erect telegraph lines on property belonging to private persons or public bodies. There was no power to regulate lines constructed by government but worked by lessees and no penalty other than revocation which could be imposed on lessees or licensees. These defects were remedied by the Act of 1885, which repealed the earlier Act and is still in force, though amended eight times. The Act, which defines "telegraph" in most comprehensive terms, gives the Central Government the exclusive privilege of establishing, maintaining and working telegraphs but with power to grant licences. The Central Government may make rules regarding telegraphs established, maintained and worked either by itself or licensees; it may also make rules regarding wireless telegraphs on ships in Indian waters and on aircraft within or above India or Indian waters. Any railway company must permit government to enter on its land to establish or maintain a telegraph. In times of emergency the Central or a State Government may take possession of any telegraph and forbid transmission to or from specified persons or of specified classes of messages. The Director-General of Posts and Telegraphs may put posts and lines on any immovable property and enter on that property to repair or remove them; trees likely to interrupt telegraphic communications may be removed. Any person wishing to exercise a legal right, which may damage a post or line or interrupt telegraphic communication, must give a month's notice in writing; if he fails to do so, he may be ordered by a magistrate to abstain for one month and take such steps as are necessary to prevent damage. If he acts to avert imminent danger to the person, it is sufficient if he gives such notice as is possible, or, if none, gives notice of what he has done forthwith. Government is not liable for delay in transmission of messages. The Act has a chapter defining offence and providing penalties. A State Government may employ extra police in a locality where wrongful damage to telegraphs is repeatedly caused or apprehended and charge the inhabitants with their cost.

Owing to the numerous thefts of copper wire used in telegraph lines, frequently causing interruption of the telegraph service, the

Telegraph Wire (Unlawful Possession) Act was passed in 1950. This required every person in possession of wire to declare it; if he has more than ten pounds the excess must be melted down. A person in possession of telegraph wire is obliged to prove that he came by it lawfully; unlawful possession may be punished with five years' imprisonment. An amending Act of 1953 forbade the purchase or sale of telegraph wire without permission from the prescribed authority.

The Wireless Telegraphy Act, 1933, with exceptions, prohibits the possession of any apparatus of transmitting or receiving sound *signals or images by means of electricity without the use of wires or* continuous conductors except under licence granted under the authority of the Director-General of Posts and Telegraphs.

CHAPTER 21

LAWS RELATING TO PROFESSIONS

Acts Relating to Higher Education

As the right to follow certain professions is restricted to persons holding degrees and diplomas, a word must be said about legislation regarding universities. Though higher western education was previously available, Acts of 1857 created universities in the three Presidency Towns and conferred necessary powers on their officers; an Act of 1887 did the same for the University of Allahabad. The Indian Universities Act, 1904, introduced a great measure of uniformity in the management of the four universities mentioned, for it specifically stated that it was deemed to be part of each of the four earlier Acts. The devolution rules under the Government of India Act, 1919, made education a provincial subject and the appropriate provincial Legislatures passed the Allahabad University Act, 1921, the Madras University Act, 1923, and the Bombay University Act, 1928, the earlier Central legislation mentioned being *pro tanto* repealed. Under the Government of India Act, 1935, education remained a provincial matter and the policy of having at least one university in each Province, established by provincial legislation, took root and flourished. There are now fifty-six Indian universities.

Under the Constitution education, including universities, is on the State List,[1] but this is subject to the Union power to legislate for the Banaras Hindu University, the Aligarh Muslim University, Delhi University and other institutions declared of national importance by Parliament.[2] The Union power also extends to technical institutes financed by the Centre and declared of national importance.[3] Union institutions for professional and vocational training, the promotion of research and technical assistance in investigating crime,[4] co-ordination and determination of standards in institutions for higher education or research and in scientific or technical institutions.[5] Vocational training of labour is on the Concurrent List.[6]

The Bengal State Legislature passed the Calcutta University Act, 1951, and abolished what remained of the Central legislation previously mentioned. Aligarh and Banaras are open to all and their

[1] Sched. 7, List 2, item 11.
[2] Sched. 7, List 1, item 63.
[3] Sched. 7, List 1, item 64.
[4] Sched. 7, List 1, item 65.
[5] Sched. 7, List 1, item 66.
[6] Sched. 7, List 3, item 25.

activities are not confined to the faculty of theology; they are governed respectively by the Aligarh Muslim University Act, 1920, and the Banaras Hindu University Act, 1915. Both Acts were amended in 1951 so as to restrict religious instruction to volunteers; in 1958 the latter Act was amended so as to control the power of appointment to teaching posts, for its exercise showed some disquieting features. The Delhi University Act, 1922, makes the university court the supreme authority in the university. The court makes and amends statutes prescribing the composition, powers and duties of the university councils, committees and boards, the appointment, powers and duties of the officers of the university, the establishment of faculties, departments, halls, colleges and institutions and also the admission and recognition of colleges. The executive body is the executive council; it may propose statutes to the court and it makes ordinances regarding admission of students, courses of study, degrees, diplomas, fees, conduct of examinations, maintenance of discipline. All statutes and ordinances require the approval of the visitor, who is the President of India. The academic council controls education and examinations; it advises the executive council on all academic matters. There is also a finance committee. Every student must reside in a college, a hall, or under conditions laid down in an ordinance. The executive council may withdraw recognition from a college or hall not conducted according to the ordinances.

Other University Acts follow generally the same pattern, though a court is sometimes called a senate and an executive council a syndicate and the method of constituting them is not identical. The State Governor is usually the Chancellor and the President of India the visitor or rector. The Vice-Chancellor, who might be compared to the chief executive officer of a large municipality, is usually a professor. Some University Acts emphasise the residential character of the university but the majority contemplate a number of affiliated colleges; different Acts give the power to allow affiliation or to disaffiliate to different authorities.

The University Grants Commission Act, 1956, forbids any institution not established by an Act of an Indian Legislature to call itself a university or confer degrees. The commission is appointed by the Central Government to hold office for six years and consists of three vice-chancellors, two officers of the Central Government and four educationists of repute. The functions of the commission are to inquire into the financial needs of universities and make grants to universities established by the Central Government; it may make grants to other universities after considering their development, needs, standards, and national purposes. The commission may also recommend to universities measures necessary for improvement and advise

on the establishment of new universities. It may collect information regarding university education, finance, studies and standards of teaching. It may order an inspection of any department of any university. Its funds are supplied by the Central Government, though State Governments and others are not forbidden to help.

In exercise of its powers to legislate on technical institutions Parliament has enacted the Institutes of Technology Act, *1961*, the Massachusetts Institute of Technology furnishing the inspiration. The institute at Kharagpur was previously incorporated by an Act of 1956. It and new institutes at Bombay, Madras and Kanpur are dealt with by the statute and declared to be of national importance. An amending Act of 1963 brought the College of Engineering and Technology, Delhi, within the scope of the Act. Each of these institutes provides for instruction and research in engineering, technology, science and arts, grants degrees, establishes halls of residence and maintains a unit of the National Cadet Corps. The chairman of the board of governors is nominated by the President of India, who is the visitor; the other members are the director, one nominee of each State Government within the zone in which the institute is situated, four experts in education, engineering or science and two professors. The board is responsible for general superintendence and control, makes policy decisions on administration and working, institutes courses of study, makes statutes and approves, modifies or cancels ordinances. The senate consists of the director and deputy director, the professors, three educationists of repute nominated by the chairman in consultation with the director, in addition to other members of the staff. It is responsible for standards of instruction and examinations; it makes ordinances. There is a council consisting of the Minister in charge of technical education, the chairman and director of each of the institutes, the chairman of the university grants commission, the director-general of the council of scientific research and others. Its function is to co-ordinate the activities of the institutes, for instance by advising on courses, degrees and admission standards, by laying down a recruitment policy and by commenting on budgets and development plans.

Acts Relating to Medical Practitioners and Members of Allied Professions

Legal, medical and other professions are on the Concurrent Legislative List.[7] At the beginning of the British period, practitioners of western medicine were few and had a limited clientele among Indians, but in the course of time, especially after the establishment

[7] Sched. 7, List 3, item 26.

of hospitals, they gained an ascendancy over practitioners of indigenous systems and it became necessary to legislate against persons who professed ability to practise western medicine without the necessary training and ability. The (British) Medical Act of 1858 provided for admission to the British medical register of persons holding diplomas granted in any part of the Empire, if they were entitled to practise by the local law and if the British general medical council recognised their diplomas as a sufficient guarantee of their competence. This applied to Indians trained in Indian medical colleges and schools but it did not prevent them securing civil and military appointments in India, even though they were not on the British register.

The Indian Medical Diplomas Act, 1939, now repealed, was passed to give effect to a provision in the Government of India Act, 1935, for reciprocity between India and the United Kingdom in regard to recognition of medical qualifications. An Indian law imposing restrictions on the right of a person holding a British diploma to practise in India would only be valid if it provided for notice to the institution and a reference to the Privy Council and was based on the ground that the diploma did not guarantee competence. This restriction would continue so long as the law of the United Kingdom was similarly restricted in favour of holders of Indian diplomas practising in the United Kingdom.

Registration of qualified practitioners in western medicine began in Bombay with the enactment of the Bombay Medical Act, 1912. This has been amended nine times, mainly to maintain harmony with Central legislation on the same topic. Other States have legislation on the same subject. The Act, in its present form, provides for a medical council, consisting of five nominees of the State Government, three members elected by faculties of medicine in universities in the State, three elected by the governing body of the College of Physicians and Surgeons, Bombay, and six elected by registered medical practitioners. The council appoints a registrar to maintain the register of practitioners holding Indian and foreign qualifications set out in the schedules to the Indian Medical Council Act, 1956. The case of any practitioner with other qualifications may be referred to the executive committee established by the Indian Medical Council Act, 1956, and he will be registered if the executive committee recommends it, being satisfied that he has the necessary skill and knowledge. The Bombay council can remove a practitioner's name from the register, after inquiry, on conviction of an offence involving moral turpitude or infamous professional misconduct. An unregistered practitioner cannot sign any medical certificates required by any

statute; he is debarred from appointments in hospitals and in the public health service. The council can call on any medical school to furnish particulars of its courses and examinations and require the presence of observers at its examinations.

In its original form this statute did not deal with foreign diplomas, nor did other provincial legislation, and some Provinces were without registration. As a matter of administrative convenience, provincial registration was desirable but this could hardly be enforced on a reluctant Province and it would be inexpedient to have diplomas recognised in one Province but not in another. This called for the enactment of the Indian Medical Councils Act, 1933, which set up a Central Medical Council for India with power to negotiate with foreign governments on schemes for reciprocal recognition of diplomas. It also provided for Central registration and uniformity in standards of recognition. The Act was repealed by the Act of 1956 which, while maintaining the structure created by the Act of 1933, applies to those parts of India formerly under Princely rule, gives representation to licentiates, provides for registration of citizens with foreign qualifications not previously recognised and for temporary recognition of persons with qualifications, obtained in countries with whom India has no scheme of reciprocity, who are teaching or pursuing research in Indian institutions. It also provides for a post-graduate medical education committee.

Under the Act of 1956 the council is composed of a member from each State, nominated by the Central Government in consultation with the State Government and one member of the medical faculty of each university elected by the senate or court. It also includes one member from each State with a medical register, elected (a) by registered practitioners holding qualifications prescribed in the Schedules to the Act granted by Indian institutions (mostly graduates), (b) by institutions of countries having a reciprocity scheme with India, and (c) by other Indian institutions not coming within the first class (mostly licentiates). Seven members are elected from among themselves by persons on the State registers who belong to the third category just mentioned. Eight members are appointed by the Central Government. The president and vice-president are elected by the members. The executive committee, to which the council may delegate any of its powers, consists of the president, vice-president and from seven to ten others elected from among themselves by the council. Any medical institution in India may be added to the list in the schedule of recognised medical qualifications by the Central Government after consulting the council. The council may settle a scheme with a foreign registering authority and

thereupon the Central Government may add the foreign qualifications involved in the scheme to those in the schedule. There is another class of foreign qualifications in the schedules, to which addition may be made by the Central Government, after consulting the council; no person with such qualifications may be registered unless he is an Indian citizen and has undergone practical training. The council may call for information about courses of study and examinations, send inspectors to examinations and, after giving the institution the opportunity of furnishing an explanation, may represent to the Central Government that the examinations of a scheduled institution in India do not ensure competence, whereupon the Central Government may withdraw recognition. The council may prescribe standards for post-graduate work; a post-graduate medical education committee, consisting of nine members of the council with post-graduate qualifications and teaching experience, advises the council on all post-graduate matters; if the council does not agree, it must forward the advice with its own views to the Central Government. The Indian medical register provided for by the Act includes the names of those enrolled on the State registers. A registered practitioner may practise anywhere in India and is entitled to bring an action for the recovery of his professional fees.

On a complaint that the council is not complying with the Act, the Central Government may set up a commission, of which it appoints two members, one being a judge of the High Court, while the council appoints the other member. If the commission finds the council at fault, it may recommend remedies, which the Central Government may require the council to adopt.

The Medical Degrees Act, 1916, restricted the right of conferring degrees and diplomas implying that the holder is qualified to practise western medicine to universities established by Central legislation, the State Medical Faculty of Bengal, the College of Physicians and Surgeons of Bombay, the Board of Examiners at the Medical College, Madras and other authorities notified by State Governments. Any other institution which purports to do so is liable to a penalty and any person who falsely assumes any title or description implying that he is qualified to practise western medicine is liable to fine on conviction.

Some States have legislation for registration and securing competence of practitioners of other systems of medicine. The Maharastra Medical Practitioners Act, 1961, provides for the registration of practitioners of the Ayurvedic and Unani systems and the creation of a faculty to prescribe courses of study, examinations and standards. Any institution purporting to train students in these

systems must be recognised by the faculty. The Bombay Homoeopathic and Biochemic Practitioners Act, 1959, provided for a board to exercise disciplinary powers over practitioners of these systems, for examiners to prescribe textbooks and courses of study, hold examinations, grant degrees and maintain efficiency in the practice of these systems. The Act also provided for registration.

The Madras Nurses and Midwives Act, 1926, was the first of a number of provincial Acts dealing with the same subject, providing for a council with functions analogous to those of the medical council in the provincial legislation, for registration of nurses, midwives and, subject to special conditions, *dais*.* But the diversity in standards of training and examination in the different Provinces called for the enactment of the Indian Nursing Councils Act, 1947, the main purpose of which was to set up a nursing council to prescribe a uniform minimum standard of training, supervise examinations and maintain a schedule of qualifications necessary for registration throughout India. No person may be enrolled on a State register without such qualifications. The Act was amended in 1957 to broaden the basis of recruitment to the council, to facilitate the registration of citizens with foreign qualifications, to enable the Central Government to amend the list of recognised qualifications and to provide for the maintenance of an all-India register of nurses.

Provincial Legislatures took the lead in regulating dentistry. The Bengal Dentists Act, 1939, now repealed, was the first of its kind and it followed the pattern of the medical Acts. Elsewhere there was no provision for training of dentists and no restriction on practice by untrained dentists. The Central Legislature, therefore, passed the Dentists Act, 1948, which created the Dental Council of India and State councils. The Central council lays down standards of training and qualifications for recognition and demands from State councils information as to training and examinations within their States. The Indian register reproduces the entries in the States registers; it also includes "dental hygienists," *i.e.*, persons entitled to carry out simple extractions and minor dental work. Practice by unregistered dentists was to cease three years after the date for first applications for registration but persons who had practised as dentists for five years before the commencement of the Act were allowed to register without possessing the prescribed qualifications. The amending Act of 1955 extended a similar privilege to evacuees from Pakistan. The parent Act had permitted temporary registration of persons who had practised for two years in the five preceding the Act, and permanent registration of persons who passed their

* *A dai is an accoucheuse not trained in a hospital following western medical practice.*

examinations within five years of the Act coming into force. This period was extended to ten years. The Act has a Schedule of recognised Indian and foreign qualifications.

The Pharmacy Act, 1948, established a Central council to prescribe the minimum standards of education, approved courses of study and examinations for pharmacists, as well as State councils responsible for maintaining registers of qualified pharmacists. State Governments may forbid any person other than a registered pharmacist to prepare any medicine on the prescription of a medical practitioner.

The Bombay Veterinary Practitioners Act, 1953, appears to be unique; the subject has not yet received the attention of Parliament. Its provisions are an adaptation of the other legislation considered in this section.

Acts Relating to Legal Practitioners and Accountants

Though the legal profession, like other professions, is a subject on the Concurrent List, Parliament alone can legislate regarding persons entitled to practise before the Supreme Courts and the High Courts.*

The Legal Practitioners Act of 1879 empowered a High Court to make rules governing the admission and discipline of pleaders who practised in the courts subordinate to it, and before revenue officers and tribunals within its territorial jurisdiction. Such rules usually required from an applicant for admission proof of domicile, certified proficiency in the vernacular, a university degree in law, or success in a professional examination in law, a year's reading in chambers, and certificates of good character. On admission, the Registrar of the High Court issued a certificate for which a stamp fee was payable and which had to be renewed annually. The certificate set out the courts and offices before whom the holder was entitled to practise, and he had to apply for enrolment in those courts in which he intended to practise.

The High Court could suspend or dismiss a pleader for taking instructions from a party, or the servant, friend or relative of a party who had not retained him, or for attempting to secure employment through a tout or other person remunerated for the service, or for offering part of his fee as a reward for having procured employment, or for fraudulent or grossly improper professional conduct, or on conviction of a criminal offence implying such a defect of character as to render him unfit for pleadership.

The pleader against whom it was proposed to take disciplinary

* Sched. 7, List I, items 77 and 78.

action had to be given notice and a copy of the charge. The inquiry could be initiated by the subordinate court in relation to whose proceedings the misconduct was alleged to have been committed, and the District Court or the Collector could suspend the pleader during the investigation, but the final order was to be passed by the High Court.

The same Act provided penalties, *inter alia*, for illegal practice, and empowered the High Court, the District Court, and the Collector to place on the list of touts, on evidence of reputation, the name of any person who had been given the opportunity of showing cause. Persons on the list could be excluded from the court precincts. The Legal Practitioners (Women) Act, 1923, declared invalid any rule disqualifying women on grounds only of sex.

The Bar Councils Act of 1926 gave advocates, who were entitled as of right to practise in a High Court, a measure of autonomy not enjoyed by pleaders. The Bar Council was a body corporate composed of the Advocate-General of the State, four members nominated by the High Court and ten elected by the advocates from among themselves. It could, with the previous sanction of the High Court, make rules regulating the admission of advocates but not so as to affect the High Court's discretion to refuse admission. It could also make rules on the rights and duties of advocates, conditions on which practice would be permitted, facilities for legal education and charges for it. An advocate could practise in his own High Court and, subject to rules governing right of audience of advocates of other High Courts, before any tribunal authorised to take evidence. A complaint of misconduct against an advocate, if presented to a High Court, could be heard, after consultation with the council, by a district judge; alternatively the Chief Justice could appoint a tribunal of from three to five members of the council. The finding had to be reported to the High Court, which, after giving the Advocate-General and the advocate concerned the opportunity to be heard, would pass final orders. If the complaint was not dismissed, the advocate might be reprimanded, suspended or struck off the roll of advocates maintained by the Bar council.

In 1953 the All-India Bar Committee recommended the grant of complete autonomy to the Bar and other reforms, which are embodied in the Advocates Act, 1961. Parts of this Act are already in force and, when the whole Act comes into force, the Bar Councils Act, 1926, and most of the Legal Practitioners Act, 1879, will be repealed. Though the Act continues the dual system of advocates and attorneys prevailing in the High Courts of Calcutta and Bombay,

elsewhere it recognises for the future only one class of legal practitioner, advocates. They have a uniform qualification for admission. An applicant must be a citizen and at least twenty-one years of age; he must have a degree in law of an Indian university and, after February 28, 1962, the degree must be recognised by the Bar Council of India or he must be a barrister; he must also ordinarily have undergone a course of training and passed an examination prescribed by the State council. The Supreme Court or a High Court may designate an advocate as senior advocate; he will then be subject to rules, made by the Bar Council of India, prohibiting him from doing minor work like drafting pleadings. There is a Bar Council for each State and for Delhi; for the purposes of the Act other Territories are associated with specified States. The councils in Assam and Delhi have fifteen members; other State councils have twenty; they are elected by proportional representation with the single transferable vote given by advocates on the State roll. The functions of the State councils are to maintain the roll of advocates, to hear and determine cases of misconduct, to safeguard the rights and privileges of the Bar and to promote law reform. The Bar Council of India consists of the Attorney-General, the Solicitor-General and one member from each State council elected by its members. Its functions are to maintain a common roll, to lay down standards of conduct and etiquette, to safeguard the rights and privileges of the Bar, to promote law reform, to deal with matters referred to it by State councils, to supervise State councils, to lay down standards of legal education in consultation with universities and to grant recognition to university degrees as qualifications for enrolment. Complaints of misconduct are usually heard and determined by the disciplinary committee of the State council, after giving the Advocate-General and the advocate concerned the opportunity to be heard. Appeals lie to the Bar Council of India.

A provision in the Indian Companies Act, 1913, gave the Central Government powers under which it framed the Auditors' Certificate Rules, 1932, and the Indian Accountancy Board, mainly elected by registered accountants, advised government and assisted in maintaining standards of qualifications and professional conduct. These arrangements were never regarded as permanent; they were intended to pave the way to a system of autonomous associations, which would assume responsibility for these matters. The Chartered Accountants Act, 1949, amended three times, created the Institute of Chartered Accountants of India, a body corporate consisting of all accountants previously registered and subsequently to be registered, for so long as they remained on the register. Persons who pass the

examinations or complete the course of training prescribed by the institute or who pass other specified examinations are entitled to be registered as associates but no member may practise without a certificate to practise. Members who have been in practice for five years and have such other qualifications as are prescribed by the council as equivalent to the experience acquired in five years' continuous practice may be registered as fellows.

The council of the institute consists of twenty-four fellows elected for three years in regional constituencies and six persons nominated by the Central Government. The council elects a president, who is the chief executive officer of the institute, and a vice-president, each of whom holds office for a year. The duties of the council include the examination of candidates for registration, regulation of the training of articled and audit clerks, recognition of foreign qualifications, granting and refusing certificates to practise, upkeep of the register, maintenance of standards and upkeep of a library. Cases of alleged misconduct are dealt with by a disciplinary committee of the council. In relation to practising chartered accountants, misconduct includes allowing a person who is not a chartered accountant nor his partner nor his employee to practise in his name, paying a commission on fees to a person who is not a member of the institute and accepting part of the profits of the professional work of a person who is not a member of the institute. Advertising, soliciting professional work, accepting a position previously held by another chartered accountant without informing him, accepting fees based on a percentage of profits contingent on his findings and rendering any statement known to be false, also come within the concept of misconduct. The penalties which may be imposed are reprimand and removal from the register. If the committee thinks the period of removal should exceed five years, it must refer the matter to the High Court.

The council is empowered to set up regional councils and make regulations defining their functions. No company may practise as a chartered accountant. Penalties are provided for falsely pretending to be a chartered accountant and other offences defined in the Act.

Laws Relating to Journalists

The laws relating to labour which have been discussed are concerned with protection against exploitation and improvement of conditions of service. The laws relating to professional men are aimed at the prevention of unqualified persons practising their professions and disqualifying from practice persons guilty of misconduct. The journalist would probably regard himself as a professional man and the legislation to which it is now proposed to refer is interesting

in that it applies to a profession legislation of a trend otherwise reserved for labour in India, though, generally subject to a wage maximum, such legislation usually applies to clerical labour.

A press commission, established by government to inquire, *inter alia*, into journalists' conditions of employment, made recommendations which have been embodied in the Working Journalists (Conditions of Service) Act, 1955. It applies to journalists employed in a newspaper establishment otherwise than in a managerial or administrative capacity. With exceptions, the provisions of the Industrial Disputes Act, 1947, apply; the Industrial Employment (Standing Orders) Act, 1946, and the Employees Provident Fund Act, 1952, apply to establishments with at least twenty employees. A working journalist may not work more than 144 hours in four consecutive weeks and he must be allowed twenty-four consecutive hours' rest in any period of seven days. He is entitled to holidays with full pay for one-eleventh of the period spent on duty and sick leave on half pay for one-eighth of the period. The Act provided for a wage board to which the Central Government would appoint equal numbers of representatives of employers and employees; its purpose is to fix rates for time and piece work, having regard to the cost of living, wages in comparable employments and the circumstances of the newspaper industry in different parts of India. After its decision has been communicated to government, it must be published within a month and is binding on employers and employees as from the date specified or, if none, the date of publication.

The Supreme Court set aside a decision of a wage board on the ground that no account had been taken of the ability of the industry to pay.[14] Government in vain conferred with employers and journalists in an attempt to frame an agreed scheme. An Ordinance was therefore promulgated and subsequently replaced by the Working Journalists (Fixation of Rates of Wages) Act, 1958.

This enabled government to establish a committee under the chairmanship of an officer of the Ministry of Law, consisting of an officer from each of the Ministries of Home Affairs, Labour and Information, and a chartered accountant. The committee could call on persons interested to file objections to wage board decisions, giving their grounds, their own views of reasonable rates and the alterations advocated. The committee had all the powers of an industrial tribunal in relation to an industrial dispute referred to it under the Industrial Disputes Act, 1947. On receipt of the committee's recommendation, the Central Government could make an order, with or without modifying it, binding on the journalists and

[14] *Express Newspapers, Ltd. v. Union*, A.I.R. 1958 S.C. 578.

their employers. After three years, if it thinks the order needs revision, government may set up a wage board. A journalist may obtain from the State Government a certificate that a specified sum is due from his employer; if this is presented to the Collector, he may recover the amount as though it were an arrear of land revenue.

Copyright and Patent Law

If the modern welfare State is disposed to confine the benefits of its social insurance legislation to labour and deal harshly with capital and the employer, it still extends its protection to the brain-children of its intelligentsia. Until 1957 the Indian law of copyright was contained in the British Act of 1911, as modified by the Indian Act of 1914, the powers of the Board of Trade in England being exercised by the Central Government. Apart from the incongruity of such a situation in independent India, the growing awareness of their rights and obligations among Indian writers, the experience gained in the working of the Act of 1914, the invention of the radio and other devices for the wide diffusion of ideas and the necessity of fulfilling international obligations relating to copyright all pointed to the necessity of a complete revision of the law on this subject and its enactment in a comprehensive code.

Copyright, as defined in the Copyright Act, 1957, means, in relation to a literary, dramatic or musical work, the exclusive right to reproduce, publish or perform it and to publish a translation of it; it also includes the exclusive right to communicate the work to the public by radio or loud-speaker, the right to make an adaptation of the work and the right to do any of the above-mentioned things with a translation or adaptation. The definition covers similar activities in relation to artistic works, cinema films and gramophone records.

Copyright exists in a work first published in India and in a work published outside India, if the author was an Indian citizen at the time of publication or, when publication takes place after his death, if he was a citizen at the time of his death. Copyright subsists in an unpublished work if the author was a citizen or domiciled in India at the time of making the work. There are comparable rules in regard to pictures, films and records. For copyright to exist in an architectural work, it must be located in India.

Prima facie the author is the first owner of all copyright in a work but the proprietor of a newspaper or magazine is the owner of the right to reproduce the work of an author in his employ. The copyright in a photograph, painting, or cinematograph film made for valuable consideration at the instance of any person is in that person. Copyright may be assigned and any interest in the right may be

licensed to another but only by writing signed by the owner. A bequest of a literary, dramatic or musical work includes the copyright. Copyright in a work published in an author's lifetime usually subsists for fifty years after his death; if it is published after his death, for fifty years after publication.

The Act established a copyright office under the control of a registrar of copyright, appointed by and acting under the direction of the Central Government. Government also appoints a registrar, who controls the copyright office where the register is kept. The owner or any other person interested in a copyright may apply for its registration and an entry in the register is prima facie evidence of its contents.

The Central Government also constitutes a copyright board, consisting of from two to eight members with a chairman who is, has been or is qualified to be a judge of a superior court. The board may perform its functions in benches constituted by the chairman. The board determines whether sufficient copies of a work are available to amount to publication. It must hear a complaint that the owner of copyright in the work of a citizen or in a film made in India refuses to publish; if the board is satisfied that the refusal is unreasonable it may direct the registrar to grant a licence to the complainant. Any person may apply to the board for a licence to publish a translation of a literary or dramatic work but, to secure it, he will have to prove that no translation has been published under the authority of the owner within seven years of publication or that such translation is out of print and that the author has refused to authorise translation. The board has to decide whether a work published in India and in other countries will be entitled to shorter protection in those countries than in India; if this is the case, the work will be deemed to be published in India. The board can rectify the register on the application of the registrar or any person aggrieved. A performing rights society must file statements of fees, charges and royalties for the performance of works for which it has authority to grant licences; objections may be filed and will be heard by the board. Appeals lie from the board to the High Court.

The Act also provides protection for works of foreign authors and for works published outside India, if the relevant foreign country has entered into a treaty or is a party to a convention giving protection in that country to works published in India. A broadcast reproduction right subsists for twenty-five years in any broadcast programme.

Copyright is infringed if any person without a licence or in contravention of a licence does anything which it is the exclusive right

of the owner to do; whoever knowingly and for profit permits any place to be used for a public performance of a work which constitutes an infringement is under the same liability; whoever makes for sale or hire or sells or lets or offers for sale an infringing copy of a work is also liable for infringement. But there are numerous statutory defences such as dealing fairly with a work for research, private study, criticism or review and publishing short passages in a collection for educational institutions. If infringement is established in a civil court, decrees for an injunction, damages and for accounts may be passed. Infringing copies are deemed to be the property of the owner of the copyright. A person threatened with proceedings may sue for a declaration that there has been no infringement, for an injunction and for damages. Even after assignment of his copyright, an author may sue for an injunction and damages, if his work is distorted, mutilated or so dealt with as to prejudice his honour and reputation.

The Act also provides criminal penalties for infringement, possession of infringing copies and plates for making them and for causing false entries to be made in the register. The registrar may prohibit the importation of infringing copies.

The earliest Indian legislation in relation to patents was passed in 1856 and was based on a British statute of 1852; a grant was made subject to a specification being filed. Under the Indian Act of 1859 no grant was made until the specification was filed. The Inventions and Designs Act, 1888, repealed the earlier law but did not reproduce the British practice which had been introduced by the Act of 1883 because the small amount of patent work in India did not seem to justify it. Under the Indian Act of 1888 an inventor submitted an application with a description to the Central Government; the title given to the invention was published in the *Gazette* and the application was made available to the public for inspection for ten days. The inventor was then examined for the purpose of establishing that he had complied with the Act and that his invention was new, any objections filed being considered. If the application was approved, leave to file a specification was granted; this had to be done within six months. The specification was examined with the object of ascertaining whether it tallied with the description. If the result was satisfactory, the exclusive privilege of manufacture, on notification in the *Gazette*, accrued to the inventor as from the day the specification was received and lasted for fourteen years. There were provisions for revocation but the procedure was ineffective in that the public had inadequate opportunities for learning the nature of the invention before the patent was granted. But legislative action was postponed until after the enactment of the (British) Patents and

Designs Act, 1907, the principles of which were embodied in the Indian Patents and Designs Act, 1911, which repealed the Act of 1888 and is still in force, though it has been amended sixteen times.

Under the existing law the application to the patent office must declare that the applicant is the first inventor or his assign and be accompanied by a provisional or complete specification. A provisional specification must describe the nature of the invention; a complete specification must give particulars and state the manner in which it is to be used. The controller of patents, who is in charge of the patent office, may require further particulars. If the application is not accompanied by a complete specification, that must be filed within nine months. When the complete specification is filed, the application is referred to an examiner for report. If the application, title or specification is defective or the invention, as described, is not new, the controller may reject the application or require its amendment; the applicant may appeal to the Central Government. If an application is not accepted within eighteen months (which may be extended on payment of a fee), it is deemed to have been refused. If the controller accepts the application, he must advertise it and leave the application, specifications and drawings open to public inspection. Within four months any objector may file a notice of opposition to the grant on such grounds as that the applicant got the invention from him or that the invention has been claimed in a specification which will be patented on a date prior to the applicant's or that the invention is inadequately described or that it is publicly known or used in India or that the provisional and complete specifications describe different inventions. If there is no objection or if the hearing of the objection goes in the applicant's favour, a patent will be granted on payment of the prescribed fee within twenty-four months of the date of the application and will take effect from that date, except that no proceedings for infringement will lie for things done before acceptance is notified.

The patentee has the exclusive right of making, selling and using his invention and authorising others to do so for sixteen years. This may be extended for five years and in exceptional cases ten years, on the ground that it has not been sufficiently remunerative. An application for extension must be made to the Central Government, which may dispose of it itself or refer it to the High Court. In either case regard will be had to the nature and merits of the invention in relation to the public, the profits made and the circumstances of the case. All particulars regarding patentees and all matters affecting the validity and ownership of patents are entered on the register of patents, kept in the patent office; each entry is prima facie evidence of what it states.

After three years from the grant of a patent, any interested person may apply to the controller for a licence on such grounds as that the invention is not being worked to the fullest reasonable extent or the demand for the patented article is not being reasonably met or that the commercial working of the invention in India is being hindered by its importation from other countries.

The Central Government may revoke a patent on the ground that it or the way it is used is mischievous to the State or prejudicial to the public. It may be revoked by the controller if the patentee surrenders it. A petition for revocation may be filed in the High Court by the Advocate-General or any person authorised by him on such grounds as that the invention is not new or is useless or is not fairly described in the specification. Any person may file a petition on the ground that he was the first inventor or the patent was obtained by fraud on him or the thing invented was publicly known and used before the date of the patent. A patentee may sue for infringement; any ground for revocation may be pleaded in defence.

The Act also provides for the registration of designs, if they are new and original. Copyright then lasts for five years and may be extended for another five. While it subsists, no person may apply the registered design for the purposes of sale to any class of goods for which it is registered or any fraudulent or obvious imitation, except by licence or the written consent of the owner.

There are provisions for implementing conventions with the United Kingdom and other British Dominions. A person who has applied for protection of an invention or design in the United Kingdom is entitled to claim that the patent granted in India shall have the same date as the application in the United Kingdom, provided he applies to the Indian patent office within twelve months, or, in the case of a design, six months. The Central Government may notify a similar procedure when a convention has been effected with any Dominion.

Patents and copyright are on the Union List.[11]

[11] Sched. 7, List 1, item 49

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